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ABSTRACT

In 1987, the United States Senate established the Special Committee to investigate American Indian affairs. Fraud, corruption, and mismanagement were found pervading the institutions serving American Indians. Corruption was also discovered in Indian tribal governments. The Committee faulted Congress for failing to adequately oversee and reform Indian affairs. After 2 years, the Committee reported that the pattern of abuse is endemic because Congress has never fully rejected the paternalism of the 19th century. The U.S. government maintains a stifling bureaucratic presence in Indian country, and fails to deal with tribal governments as responsible partners. The Committee recommends the creation of a new federalism for American Indians which negotiates agreements with tribes, abolishes paternalism and, while providing the requisite federal funds, allows tribal governments to stand free, independent, responsible, and accountable. This report provides a brief history of congressional investigations and American Indian affairs from 1789 to 1989. The report lists findings on economic development and Indian preference contracting, child sexual abuse in federal schools, the federal government and American Indian natural resources, the Indian Health Service, Indian housing, and corruption among tribal governmental officials. Legislative recommendations are included. (ALL)

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101st Congress
1st Session

SENATE

Report
101-216

FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS

A REPORT

OF THE

SPECIAL COMMITTEE ON INVESTIGATIONS

OF THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

November 20 (legislative day, November 6), 1989.—Ordered to be printed

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WASHINGTON : 1989

UNITED STATES SENATE

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SENATOR JOHN McCAIN, Arizona, *Co-Chairman*
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UNITED STATES SENATE

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LETTER OF TRANSMITTAL

U.S. SENATE,
SPECIAL COMMITTEE ON INVESTIGATIONS,
Washington, DC, November, 1989.

Hon. ROBERT C. BYRD,
President Pro Tempore,
U.S. Senate, Washington, DC.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. PRESIDENT AND MR. CHAIRMAN: After almost two years of investigation and hearings, we are pleased to transmit our unanimous, bipartisan Final Report and Legislative Recommendations.

Part One of the Report is the Executive Summary, which summarizes our principal findings, conclusions and recommendations. Part Two is a history of past Congressional investigations of American Indian affairs. Part Three constitutes a narrative of our major findings. The Report concludes with Legislative Recommendations and two appendices.

Respectfully submitted,

DENNIS DECONCINI,
Chairman.
JOHN MCCAIN,
Co-Chairman.
THOMAS A. DASCHLE,
Member.

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101st Congress
1st Session

SENATE

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FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS

A NEW FEDERALISM FOR AMERICAN INDIANS

November 20 (legislative day, November 6, 1989).—Ordered to be printed

Mr. DeConcini, from the Special Committee on Investigations of the Select Committee on Indian Affairs, submitted the following

REPORT

PART ONE

THE EXECUTIVE SUMMARY:

A NEW FEDERALISM FOR AMERICAN INDIANS

This year we celebrate the 200th anniversary of George Washington's inauguration as the first President of the United States. We also celebrate the bicentennial of our first treaty under the Constitution with American Indian tribes. These two events are not coincidental. At the birth of our constitutional democracy, our Founding Fathers chose to recognize the original inhabitants of America as independent, self-governing nations which long predated European settlement. In calling for agreements by treaty with Indians, President Washington and the founders pledged that the United States would deal with the continent's native people with consistency, fairness and honor.

In the century following 1789, however, frontier settlement unleashed economic and political forces that undermined Washington's call for stability and mutual respect in Indian affairs. Hounded by Western expansionists, and thrown on the defensive by the outspoken enemies of American Indians, Congress abandoned the Founding Fathers' commitment to fair and honorable agreements with Indian peoples. Throughout the 19th century, the federal government conducted brutal wars to subjugate resistant tribes. The military campaigns often led to conquest and forced removal of Indians from their native territory.

In exchange for the vast lands that now comprise most of the United States, the federal government promised the tribes permanent, self-governing reservations, along with federal goods and services. Instead, government administrators, many of whom were corrupt, tried to substitute federal power for the Indians' own institutions by imposing changes in every aspect of native life. At its height, there seemed no limit to the government's paternalistic ambitions. It severed ties between parents and children by confining students in government boarding schools; it shattered the authority of religious leaders by prohibiting traditional rituals and jailing those who resisted; and it destroyed indigenous economies by seizing tribal territories and reneging on the promises it made for land, federal support and financial assistance. Finally, while the government offered Indians equal membership in the United States, it failed to grant them the basic freedom enjoyed by all other Americans: the right to choose their own form of government and live free from tyranny.[1]

Only in the last two decades have federal policymakers taken some cautious steps toward renewing Indian self-rule. Pressed by a persistent and articulate American Indian leadership, as well as other concerned citizens, Congress has begun to return governmental authority to the tribes. Yet even as we near the end of the 20th century, American Indians remain largely trapped by 19th century poverty: 16 percent of reservation homes lack electricity, 21 percent an indoor toilet and 56 percent a telephone. And for the most part, federal policymakers and administrators are still held captive by the ghosts of paternalism and dependency.[2]

Now is the time, on the 200th anniversary of both our constitutional democracy and its first Indian treaty, to reject the errors of our history and return to the high standards set by President Washington. Now is the time to embark on a new era of negotiated agreements between Indian tribes and the United States that abolish federal paternalism but ensure full federal support. By launching a New Federalism for American Indians, we will reaffirm our faith in the extraordinary vision of those who created this unique Republic, while redeeming the promise made long ago to its first people.

I. THE PRINCIPAL FINDINGS OF THE SPECIAL COMMITTEE ON INVESTIGATIONS[3]

A. AN OVERVIEW

When the United States Senate established the Special Committee on Investigations nearly two years ago, we were asked to uncover fraud, corruption and mismanagement in American Indian affairs, no matter where or to whom it led. We indeed found fraud, corruption and mismanagement pervading the institutions that are supposed to serve American Indians.

But we were led to ask a larger question: Why is this pattern of abuse endemic? After two years of investigation, the answer is clear: Because Congress has never fully rejected the paternalism of the 19th century, the U.S. government maintains a stifling bureaucratic presence in Indian country, and fails to deal with tribal governments as responsible partners in our federalist system.

The Federal Agencies

Paternalistic federal control over American Indians has created a federal bureaucracy ensnarled in red tape and riddled with fraud, mismanagement and waste. Worse, the Committee found that federal officials in every agency knew of the abuses but did little or nothing to stop them.

Federal agencies knew, for example, that hundreds of millions spent on the government's program to promote Indian economic development were largely drained by shell companies posing as legitimate Indian-owned firms. The Bureau of Indian Affairs (BIA) did not need the Committee to discover that 19 of the largest so-called Indian companies that garnered federal contracts were frauds: a BIA Division Chief warned his superiors in an internal memo over a year before the Committee's hearings that the entire program was a "massive fraud [and] financial scandal." Yet, in 31 years, the BIA only discovered two minor instances of possible fraud.[4]

In federally-run schools for Indians, BIA officials knew that school administrators had hired teachers with prior offenses for child molestation. Moreover, BIA knew its employees had failed to report or investigate repeated allegations of sexual abuse by teachers, in one case for 14 years. Yet BIA promoted negligent school administrators and, unlike all 50 states, never fully adopted a system that required employees to report and investigate child abuse.[5]

Federal agencies responsible for protecting natural resources also neglected known problems. For instance, federal officials in Oklahoma admitted that Indian land was "wide open" to oil theft, yet for the past three years they uncovered none. They even ignored specific allegations against the nation's largest purchaser of

Indian oil, which Committee investigators later caught repeatedly stealing from Indians.[6]

The federal budget for Indian programs equals $3.3 billion annually. Yet surprisingly little of these funds reach the Indian people. In fact, the total household income for American Indians from all sources, including the federal government, is actually less than the entire federal budget of $3.3 billion.[7]

Not only do American Indians suffer from this extreme waste. Year after year, all American taxpayers must foot the bill for a negligent and unresponsive bureaucracy from a limited federal budget.

When the Executive Branch fails to detect problems or lacks the resources to address them, it is the responsibility of Congress to assist. When, however, federal agencies themselves are aware of problems but refuse to act, Congress must question their very existence.

Indian Tribal Governments [8]

In the last two decades, Indian tribal governments have acquired increased federal resources and statutory powers. Even with limited empowerment, tribes have established innovative programs that are tribally conceived and directed—and greatly benefit the tribal members themselves.[9] At the same time, however, federal funds and authority have been conferred on tribal entities without effective federal sanctions and enforcement against corruption. Free from tough criminal laws and energetic prosecution, some tribal officials have engaged in corrupt practices.

Chairman Peter MacDonald of the Navajo Nation is one example of a tribal chief executive who placed personal enrichment above public service. For years, MacDonald received bogus "consulting fees," "loans" and "gifts"—and even persuaded the tribe to purchase desert land worth less than $26 million for more than $33 million so that, through a shell company, he could enjoy a secret share of the $7 million markup.

Tribal officials on other Indian reservations also blatantly sought improper payments. Still others, free from even the most basic federal conflict of interest laws, used their official positions to openly award tribal contracts to their own businesses.

The Congress

Since Congress has ultimate responsibility for federal Indian policy, we in the Senate and House must accept the blame for failing to adequately oversee and reform Indian affairs. Rather than becoming actively engaged in Indian issues, Congress has demonstrated an attitude of benign neglect. On the one hand, by allowing tribal officials to handle hundreds of millions in federal funds without stringent criminal laws or adequate enforcement, Congress has left the American Indian people vulnerable to corruption. On the other hand, for years Congress has tolerated the clear administrative breakdown of federal agencies, at the same time refusing to deal with tribes themselves as responsible governments.

It is a fundamental tenet of American federalism that local governments have the responsibility to manage their own affairs, unencumbered by inappropriate federal restrictions but accountable for the funds they receive. Yet Congress has not only neglected to hold corrupt tribal officials accountable, it has instead imposed a stifling and largely duplicative layer of federal bureaucracy over all tribal governments. While paying lip service to the idea of Indian self-determination, Congress has permitted entrenched federal agencies to micro-manage tribal affairs, deluging struggling Indian governments with red tape and meaningless procedures.

Most significant, by constructing a double layer of federal and tribal governments over Indian communities, Congress has created a political no-man's land, where responsibility fluidly shifts from one entity to another. Tribal officials can easily blame the federal bureaucracy for their own failings, while federal officials are quick to defend their position by pointing to the weaknesses of tribal governments. Yet among the often justified recriminations, American Indians themselves can hold no one to task. If no one is responsible, then no one is accountable. And the American Indian citizen suffers the consequences.

B. THE FEDERAL AGENCIES

Economic Development, Social Services and Other Programs [10]

The Bureau of Indian Affairs is the principal government agency responsible for Indian affairs. A branch of the Department of the Interior, the BIA's responsibilities extend into nearly all realms of Indian life, from economic development and construction to education and social services. In every area it touches, the BIA is plagued by mismanagement. That is not to say that the Committee did not encounter many hard-working and talented individuals at BIA. Rather, the inability of so many good people to have a real impact only underscores the terminal sickness of the institution itself.

Promoting Indian economic development is one of the principal missions of the BIA. Forty-five percent of all reservation Indians live below the poverty line, almost half of all Indian adults are unemployed, and the majority of those who do work earn less than $7,000 per year.[11]

To encourage Indian economic development, since 1910 Congress has mandated preference for Indian businesses in letting federal contracts from funds appropriated for the benefit of Indians. Though the statute was passed in 1910, final regulations have never been issued. Indeed, the entire program of Indian preference contracting is a massive fraud on American Indians. Indian-owned or -controlled businesses do *not* receive preference; routinely the contracts are awarded to phony Indian shell or front companies controlled by non-Indian businessmen and created solely to obtain federal funds. Over the years, the federal government has spent hundreds of millions of dollars on a program that is worse than useless because it actively deceives the Indian people. It asserts that a worthwhile program of economic development is in progress, when in reality only those willing to defraud the government are being enriched by the federal purse.

BIA, however, was not surprised by the waste and fraud. The Special Committee discovered that more than one year before its public hearings, a BIA Division Chief had already alerted his superiors that "our program, nationwide, is open to the possibility of massive fraud." His internal memo even warned that "no action" by the BIA "will almost certainly result in a financial scandal which will call into question the ability of BIA to manage this program." Yet the Bureau made little effort to avert this "massive fraud" and "financial scandal."

Significant resources were not required to address the problem. In just eight months, the Special Committee, with a limited staff and budget, uncovered 19 major fronting relationships which dominated the market. By contrast, the BIA admitted that in 31 years it has exposed only two minor examples of possible fraud, while consistently awarding contracts to companies the Committee later proved were fraudulent.

BIA's failure to police Indian preference was not unique. The Department of Housing and Urban Development (HUD), the Indian Health Service (IHS) of the Department of Health and Human Services, and the Small Business Administration were all equally remiss. HUD, for example, admitted to the Committee that it has *never* decertified a single fraudulent company.

The Committee found that BIA also permitted a pattern of child abuse by its teachers to fester throughout BIA schools nationwide. For almost 15 years, while child abuse reporting standards were being adopted by all 50 states, the Bureau failed to issue any reporting guidelines for its own teachers. Incredibly, the BIA did not require even a minimal background check into potential school employees. As a result, BIA employed teachers who actually admitted past child molestation, including at least one Arizona teacher who explicitly listed a prior criminal offense for child abuse on his employment form.

At a Cherokee Reservation elementary school in North Carolina, the BIA employed Paul Price, another confessed child molester—even after his previous principal, who had fired him for molesting seventh grade boys, warned BIA officials that Price was an admitted pedophile. Shocked to learn several years later from teachers at the Cherokee school that Price continued to teach despite the warning, Price's former principal told several Cherokee teachers of Price's pedophilia and notified the highest BIA official at Cherokee. Instead of dismissing Price or conducting an inquiry, BIA administrators lectured an assembly of Cherokee teachers on the unforeseen consequences of slander.

The Committee found that during his 14 years at Cherokee, Price molested at least 25 students, while BIA continued to ignore repeated allegations—including an eyewitness account by a teacher's aide. Even after Price was finally caught and the negligence of BIA supervisors came to light, not a single official was ever disciplined for tolerating the abuse of countless students for 14 years. Indeed, the negligent Cherokee principal who received the eyewitness report was actually promoted to the BIA Central Office in Washington—the same office which, despite the Price case, failed for years to institute background checks for potential teachers or reporting requirements for instances of suspected abuse. Another BIA Cherokee school official was promoted to the Hopi Reservation in Arizona, without any inquiry into his handling of the Price fiasco.

Meanwhile at Hopi, a distraught mother reported to the local BIA principal a possible instance of child sexual abuse by the remedial reading teacher, John Boone. Even though five years earlier the principal had received police reports of alleged child sexual abuse by Boone, the principal failed to investigate the mother's report or contact law enforcement authorities. He simply notified his superior, who also took no action. A year later, the same mother eventually reported the teacher to the FBI, which found that he had abused 142 Hopi children, most during the years of BIA's neglect. Again, no discipline or censure of school officials followed: the BIA simply provided the abused children with one counselor who compounded their distress by intimately interviewing them for a book he wished to write on the case.

Sadly, these wrongs were not isolated incidents. While in the past year the Bureau has finally promulgated some internal child abuse reporting guidelines, it has taken the Special Committee's public hearings for the BIA to fully acknowledge its failure.

BIA's mismanagement is manifest in almost every area the Committee examined. Although the consequences are far less severe than those suffered by innocent children, in road construction, facilities management, procurement, loan programs, financial management of Indian trust funds, computer services and realty management, among others, the Committee found a pattern of callously ignoring known problems, defending and promoting incompetent staff, and ostracizing the few capable employees who dared to speak out against the institutional incompetence that surrounded them.

Natural Resources [12]

BIA is equally ineffective in its mandated role of protecting Indian natural resources. In 1970 the United States Supreme Court ruled that three of the four largest tribes in Oklahoma owned the resource-rich, 96-mile Arkansas Riverbed. But there was a catch to the tribes' good fortune: the BIA had to order surveys of the riverbed to properly apportion the land. Nineteen years later the BIA has managed to initiate surveys of only 789 of the 22,000 riverbed acres. Meanwhile, the three tribes may have lost close to $100 million in revenues from the failure to develop their riverbed natural resources. Nearby in Oklahoma, another tribe has lost its chance to have safe drinking water. The BIA allowed oil companies to irreparably pollute the tribe's groundwater, and despite the tribe's insistent pleas, the agency has failed for some 12 years to initiate the necessary litigation for damages or afford any relief.

Elsewhere in Oklahoma, individual Indian allottee owners of crude oil and natural gas have also been left in limbo. Since 1983 federal law has required that the Department of the Interior distribute royalty income from oil and gas production to all allottees, along with a comprehensible explanation of their royalty payments. Yet the BIA has created an "Explanation Of Payment Form" that many of its own employees confessed they cannot explain. Even the Director of an Interior agency with partial responsibility for royalties admitted to the Committee that he cannot understand the BIA form. Moreover, these incomprehensible forms often have tragic consequences for allottees who depend on their royalty checks. One allottee's form indicated that she received payments and owned royalty interests, which precluded her from obtaining state welfare. Yet for three years, this disabled mother of three never received proper or consistent royalty checks. Ineligible for state aid and without her royalty income, she could not support her children, and was forced to put them up for adoption and live by herself in an abandoned house.

The Interior Department's Bureau of Land Management (BLM) is charged with detecting and preventing the theft of oil and gas on Indian lands. Since 1981 in Oklahoma alone, BLM has assigned at least nine experts to inspect Indian wells and report possible incidents of theft. Yet these experts admitted to the Committee that they spent 75 percent of their time in their offices, not working in the field where theft could be detected. They simply waited for some companies to report insignificant instances of theft—for a total of nine thefts of $20,490 in nine years. At that, they confessed that they did not even properly report these thefts to law enforcement authorities.

While these officials were waiting for the phone to ring, Koch Oil, the largest purchaser of Indian oil in the country, was engaged in a widespread and sophisticated scheme to steal crude oil from Indians and others through fraudulent mismeasuring and reporting. The Committee sent its investigators into the field to conduct covert surveillance and caught Koch stealing from Indians on six separate occasions. By further investigation, the Committee determined that Koch was engaged in systematic theft, stealing millions in Oklahoma alone.

Faced with such grand larceny, the Committee asked BLM: Why weren't your experts in the field, like ours? Why didn't they pursue a specific complaint they had already received against Koch? Why did they even fail to report and pursue the pitifully low incidence of theft they compiled? While BLM Oklahoma officials acknowledged that Indian land was "wide open" to massive oil theft such as the Committee uncovered, they admittedly did nothing to detect it. When asked why they even failed to report the meager theft logged, one supervisor offered that he "didn't have the proper telephone number" for the FBI.

Incredibly, the official in charge of BLM's national anti-theft program defended the Oklahoma office's conduct. Reflecting the bureaucratic insensitivity Native Americans are forced to deal with almost every day, he proclaimed that BLM was fulfilling its responsibility to American Indians "appropriately and adequately."

Health and Housing

The federal government's failures, unfortunately, are not limited to the Department of the Interior and its agencies. The Indian Health Service, an agency of the Department of Health and Human Services, is also hampered by mismanagement. IHS senior executives authorized improper contracts to pay for business meetings at luxury resorts. In Albuquerque, for example, $70,000 in federal funds were diverted from a juvenile alcohol abuse prevention program to finance a fitness retreat for IHS managers. Yet soon after a newly-created internal Office of Program Integrity and Ethics documented a few of these abuses, top IHS management stripped its Director of his powers and the internal reviews ceased.[13]

While the Department of Housing and Urban Development spends more than $200 million per year on reservation housing, it largely entrusts the day-to-day operation of its program to tribal Indian Housing Authorities (IHA's). As is often the case in Indian country, responsibility rests with neither party and the results can be maddening. For example, a 150-unit development in Arizona was reviewed more than 30 times by inspectors for both HUD and the local IHA. At one point the HUD reviewer noted that construction was 35 percent complete. The following week, the IHA inspector declared the project only 25 percent complete and one month later, the same HUD reviewer stated it was 30 percent complete. Given such confusion, it is not surprising that less than seven months after the project was "completed," its streets were severely deteriorated, houses were built in the wrong location, and water was seeping through the walls of the units.[14]

C. INDIAN TRIBAL GOVERNMENTS [15]

There are currently about one million Native Americans living on or near Indian lands. The Navajo Nation, the largest Indian tribe in the United States, comprises more than one-fifth of that total and proudly inhabits a land three times the size of Massachusetts. The Navajos' tribal government is larger and their natural resource base more imposing than any other Indian tribe.

Without question, the leading Navajo politician of the modern era is Peter MacDonald. MacDonald has been in command as Chairman for all but four of the past 19 years. Yet unbeknownst to the people he served, Peter MacDonald ran the Navajo tribal government like a racketeering enterprise.

Chairman MacDonald trumpeted an exciting vision of economic development for the destitute Navajo Nation. By attracting private industry to the reservation, he claimed, jobs would be created to lift the Navajos—47 percent of whom were jobless—out of poverty.

"The Navajo Nation is one of America's last economic frontiers," MacDonald declared in 1987. "I see a wealth of opportunity for all of us," he went on to promise. "Let us, once and for all, share in the bounty of America!"

Little did the Navajos know that the wealth of opportunity waiting for their nation was in large part destined for Peter MacDonald personally. The Chairman devised a scheme where private enterprises attracted to the reservation had to "share the bounty of America" with MacDonald himself. Sham "consulting contracts" ostensibly with his son, bogus "loans," and simple demands for cash and gifts were among the extortionate practices MacDonald employed. But no matter what form the extortion, the unambiguous price of doing business on the Navajo Reservation was a kickback to the Chairman of the tribe.

Not content with milking kickbacks from outside businesses and squandering the economic development he so eloquently advocated, MacDonald took funds directly from the Navajo government treasury to pay for his regal trappings and lifestyle. Although 46 percent of Navajos had no electricity, 54 percent lacked indoor plumbing and 79 percent lived without a telephone, MacDonald used tribal funds to pay for private luxury airplane flights for personal trips and his own remodeled executive suite with mahogany and gold-plated fixtures. Together with his friend Bud Brown, MacDonald also conceived a scheme where a shell corporation would buy desert real estate on the open market and then sell it to the unsuspecting Navajo Nation after a substantial markup. Although the nearly 500,000 desert acres MacDonald selected for the "land flip" could have been purchased for less than $26 million, the Navajo Nation paid more than $33 million so MacDonald could comfortably enjoy a secret share of the ill-gotten profit.

As the costs of his corruption began to weigh on the tribe, MacDonald shifted blame to the BIA. Because of the blur of responsibilities, MacDonald could plausibly maintain that Navajo prosperity was subverted simply by the overbearing presence of the BIA, or as MacDonald dubbed it, "*B*oss *I*ndians *A*round." And, disturbingly, many of MacDonald's wrongdoings fell between the cracks in existing federal law, which may make his criminal prosecution extremely difficult.

MacDonald's conduct is not unique. While consistently targeting the BIA as an easily available scapegoat, some tribal officials throughout the country have profited at the expense of their people by exploiting current gaps in the criminal code. Like MacDonald, they have frequently sought bogus loans, free in-kind services and "consulting contracts" as the everyday currency of unchecked greed, yet their actions do not constitute the unequivocal bribes now required by federal law for full prosecution.

Similarly, tribal officials can practice the most transparent conflicts of interest without fear of sanction. One Midwestern tribal chairman even boasted that funneling tribal contracts to his own business only served to assure him that the tribe was getting the very best deal—never mind that, if subject to competition, the price for the services offered would have been considerably lower. In reality, the only deal was for this tribal chairman himself, who legally profited more than $600,000 on the backs of the people he supposedly served.

II. PRINCIPAL RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON INVESTIGATIONS

> We must put a stop to the monopolistic greed and commercial tyranny which has characterized the acts of certain oil companies on Indian land in Oklahoma, whose conduct in shamefully disregarding the rules and regulations of the Department of the Interior has cost both the Indian lessor and the independent operator millions of dollars.

Those words are not ours. The Secretary of the Interior wrote them in a letter to President Theodore Roosevelt in 1907. That they so uncannily mirror our findings testifies to the repeated failure of the federal government to serve American Indians. At least 42 congressional investigations have recommended federal reorganization, restructuring, re-tinkering. And in one nine-year period alone, the BIA was actually reorganized ten times.[16]

The time for tinkering is over. The time for bold leadership is now. Working together with tribal officials on a government-to-government basis, we must create a blueprint for a New Federalism for American Indians. The time has come for a federal policy that, by negotiated agreements with tribes, abolishes paternalism and, while providing the requisite federal funds, allows tribal governments to stand free—independent, responsible and accountable.

A. A NEW ERA OF AGREEMENTS [17]

Legal agreements between the United States and tribal governments have a unique place in our history. Predating the Constitution, both the Continental Congress and the first American Congress under the Articles of Confederation chose to recognize Indian governments through agreements by treaty. Significantly, the Constitution itself explicitly incorporated the continuing legitimacy of those obligations. Again, at the beginning of the Republic, President Washington and the Congress chose treaties as the basis for federal relations with Indian nations. President Washington believed that only through legal agreement could the young Republic's relationship with tribes be governed by "fixed and stable principles." To act on any other basis, Secretary Knox wrote to the President in 1789, "would be a gross violation of the fundamental laws of nature, and of that distributive justice which is the glory of a nation."

In 1871 Congress abolished treaties as the legal form for relations with Indians. A "treaty" by Constitutional definition is simply an agreement by the President made "by and with the Advice and Consent of the Senate." The 1871 abolition of treatymaking "resulted from the opposition of the House of Representatives to its practical exclusion from any policy role in Indian affairs." [18]

As the Supreme Court repeatedly held, this meant simply that after 1871 the President and Indians could negotiate "agreements" which are the legal equivalent of treaties in all respects save one: treaties must be approved by two-thirds of the Senate while agreements require implementing legislation by a majority of both Houses of Congress. Between 1871 and 1909 the United States and Indian tribes entered into 56 agreements approved by both Houses of Congress and with exactly the same force and effect as treaties. Indeed, the Supreme Court has ruled that the provisions of such agreements "like treaties [are] the supreme law of the land," and has declared that these treaties and agreements "promise more and give the word of the Nation for more." [19]

We must promise the word of our nation once again by entering into new agreements that both allow American Indians to run their own affairs and pledge permanent federal support for tribal governments. Only by enshrining in formal agreements the federal government's most profound promise will we finally bury the discredited policies of forced tribal termination and Indian assimilation deep in their deserved graves.

New agreements will, of course, be completely voluntary and not affect any rights or obligations a tribe may have due to treaties, former agreements, or existing claims against the United States. Nor would new agreements alter in any fashion the current legal status of tribal governments or their jurisdiction vis-a-vis the states. Rather, tribes which choose new agreements will finally be allowed to assume responsibility for their own affairs.

The empowerment of tribal self-governance through formal, voluntary agreements must rest on mutual acceptance of four indispensable conditions:

1. The federal government must relinquish its current paternalistic controls over tribal affairs; in turn, the tribes must assume the full responsibilities of self-government;
2. Federal assets and annual appropriations must be transferred *in toto* to the tribes;
3. Formal agreements must be negotiated by tribal governments with written constitutions that have been democratically approved by each tribe; and
4. Tribal governmental officials must be held fully accountable and subject to fundamental federal laws against corruption.

From Federal Paternalism to Tribal Responsibility

Every agreement will recognize each tribe's permanent right to exercise self-government, including its right to determine its own form of government, membership, legislative prerogatives and judicial system.

Under new agreements, the federal government will relinquish its existing paternalistic powers to review and approve or disapprove tribal constitutions, constitutional amendments, bylaws, legal codes, resolutions, ordinances, contracts, leases, and other transactions entered into by tribes. As a consequence, the tribal governing body will finally assume full authority. The federal government's legal responsibilities will become tribal responsibilities.[20]

New agreements will give each tribal government the freedom to assess its own communities' needs, set priorities, and design budgets to address those priorities. Indian governments will be empowered to manage their internal affairs in the same sense as state governments, affording them, at last, the benefits of American federalism.

The range of options available to a tribal government will be almost limitless: it can invest in schools, medical clinics, law enforcement, or physical infrastructure; it can promote individual Indian entrepreneurship, tribal businesses, or minerals extraction; it can purchase land on the open market; or it can hire management consultants and other experts to improve the administration of tribal agencies. Regardless of the outcomes, all key decisions will be made by Indian communities and their elected leaders, not by distant Senators, Congressmen or federal bureaucrats.

Tribal Responsibility Means Full Federal Transfer

All federal resources, functions and programs, fully-funded, as well as the physical assets and land of BIA, IHS and the other federal agencies, must be transferred *in toto* to the tribes entering new agreements.[21] Specifically, the federal government will agree to provide each tribe with an annual Tribal Self-Governance Grant (TSGG), equalling its fair share of the current federal Indian budget. In order to depoliticize the federal Indian budget process, the size of the grants should be strictly proportional to population.[22] Moreover, to further local decision-making, every TSGG must be provided without program restrictions or categories. Most important, to protect tribal budgets from being eaten away by inflation or the fiscal pressures faced by Congress, the United States will pledge that a tribe's Self-Governance Grant shall be a permanent entitlement with an annual cost-of-living allowance.

Signing a new agreement will allow a tribe to exit the current federal bureaucracy and receive a grant from its share of the $3 billion worth of current federal programs specifically targeted to Indian populations, such as the BIA, IHS and HUD's Office of Indian Housing. Of course, new agreements will have no affect on Indians' eligibility for state and local programs, or for federal funds which they receive on some basis other than their status as Indians, such as Social Security, food stamps, Aid to Families with Dependent Children, and various grants for which tribes compete with states, counties and municipalities.[23]

The TSGG's that tribes receive under their new agreements will be remarkably large—more than offsetting current federal services. For example, a tribe of 200,000 members (*i.e.*, the Navajo Nation) will receive approximately $600 million annually, a tribe of 5,000 members will get about $15 million per year, and even a small tribe of 350 members will receive more than a million dollars in its annual grant. These grants will not increase the federal budget at all. But they could help to reverse the stagnating welfare economies of many Indian reservations. Under the New Federalism for American Indians, government funds that are now drained by fraud, corruption, and duplicative layers of bureaucracy will be targeted directly to the Indian people who for so long they have failed to reach.

Tribal Responsibility Means Constitutional Government

As all 50 states are governed by written constitutions, fundamental principles of American federalism require that tribes democratically adopt written constitutions as well. By signing an agreement with the United States, the tribe will promise to operate in accordance with a written constitution that can be amended only by procedures explicitly set forth in the constitution itself. The constitution also must be ratified by a majority of all adult tribal members in a special referendum. Approval by an absolute majority requires that the affirmative voters outnumber both the negative voters and the abstainers. The constitutional referenda, which must precede congressional approval of agreements, ensure that agreements are negotiated by tribal governments that have the constitutional consent of the governed.

Tribes will retain the power to determine and define their own form of government, but tribal constitutions must explicitly guarantee the freedoms of speech, press, assembly, religion and the other Bill of Rights protections now required by the Indian Civil Rights Act.[24] In anticipation of the tremendous increase in tribal authority under the new federalist policy, tribes should strengthen the separation of powers between the legislative, executive and judicial branches of their governments. In the process, tribes could guarantee in their constitutions judicial review by an independent judiciary, free from interference by the tribal council or chairman. Furthermore, tribes can also forbid the use of tribal enterprises as instruments of political patronage, establish a tribal civil service, enact tribal laws against corruption, and create "sunshine" rules to ensure that all major decisions are made publicly.

Tribal Responsibility Means Accountability

In return for the transfer of federal resources and functions, agreements must provide that tribal governments adhere to comprehensive federal laws prohibiting corruption and guaranteeing fair elections. Specifically, the federal criminal code must be amended to provide that Indians are not deprived of the honest services of tribal officials by improper payments or gratuities, conflicts of interest, concealment of records, and other wrongdoing. Moreover, to ensure that corruption is vigorously rooted out, additional resources must be allocated to federal law enforcement. Corruption, no matter what guise it hides behind, can no longer be tolerated.

It is the Committee's firm conviction that accountability follows responsibility. If Indian tribal governments are afforded true self-government within our federal system, any misdeeds will rest squarely on their shoulders, not left unaccountable in a maze of shared responsibilities between federal and tribal governments.

B. THE OFFICE OF FEDERAL-TRIBAL RELATIONS

Every dollar granted to a tribe under the new system will come directly out of the current federal Indian bureaucracy's budget. To avoid asking federal officials to plan their own agency's devolution, an Office of Federal-Tribal Relations (OFTR) should be established within the Executive Office of the President, tasked with negotiating new agreements and overseeing their implementation. Since the President will negotiate agreements, the OFTR must operate under his direct guidance, free from the pressure of BIA and other agencies currently active in Indian country.[25]

The OFTR should negotiate with any tribe that wishes to adopt an agreement. One of its initial tasks will be to work with tribes and the Office of Management and Budget to set standards of accountability (including generally accepted accounting principles) for tribal governments that sign an agreement. In drafting these standards, guidelines should be modeled on those established for state and local officials who handle federal funds. Sufficient staff and resources must be assigned to the OFTR to enforce the tribes' compliance with the requisite standards of accountability. At the same time, the OFTR must share information and coordinate with federal law enforcement to guarantee that criminal sanctions against corruption are fully enforced.[26]

Depending on their unique circumstances and particular histories, different tribes are at different levels of developing their capacity for self-governance. Some tribes will be ready to immediately negotiate agreements. Others will require technical assistance and support to strengthen their governments before entering into agreements.

Because all agreements are voluntary, some tribes probably will choose to remain under the management of the current federal system until they can judge the success of tribes that adopt agreements. The OFTR should collect and disseminate data comparing the progress of tribes under each system, giving Native Americans additional information to decide whether their tribe should pursue an agreement.

Although the first few tribes to reach agreements undoubtedly will face unforeseen obstacles, they should soon find themselves profiting greatly from self-government. For too long, federal red tape and shifting commitments have forestalled the development of private enterprise on the reservations. A consistent guarantee of federal funds, without duplicative federal regulations but accompanied by heightened standards of local accountability, will provide private business with the stable environment it needs. The advantages of our market economy will now finally be available to the American Indian people, freeing them from the welfare dependency which has characterized the federal government's policy. If American Indians are as successful under the New Federalism as we anticipate, virtually all tribes will sign agreements in the next few decades, assuring that the billions now wasted on self-perpetuating federal bureaucracies will belong to the tribes themselves, to determine their own destiny.

III. CONCLUSION

The recommendations of the Special Committee call for a new era in our collective history. By extending American federalism to this country's long-neglected first inhabitants and entering into agreements with American Indians that afford them the full measure of self-government, we will be renewing, on the 200th anniversary of our constitutional democracy, the most profound ideals of the Founding Fathers.

Though based on uniquely American traditions, our call for tribal empowerment finds a resonant echo throughout the world. The United Nations has organized a Working Group to establish new international legal standards for native citizens "believing that indigenous peoples should be free to manage their own affairs to the greatest possible extent." Our northern neighbor Canada has recently embarked on a program of Indian self-government in which tribes receive multiyear grants and have local autonomy, subject to federal laws against corruption. While negotiations are proceeding slowly, in the near future many Canadian Indian tribes will achieve self-government.[27]

A new era of agreements here in the United States, of course, will strike fear in the hearts of federal bureaucrats, who stand to lose their stranglehold over Indians. Nor will it meet with favor among those corrupt tribal officials who stand to lose their ability to hide behind the federal government's failures.

Our proposal should, however, please both Indian and non-Indian taxpayers who have seen their hard-earned tax dollars squandered on a negligent and unresponsive federal bureaucracy. All Americans will benefit from a program that allocates federal resources to the people they are intended to serve, rather than to inept bureaucrats and corrupt officials. And all Americans will benefit from a proposal that, at last, morally and legally acknowledges the basic rights of our first inhabitants.

Most significant, American Indians themselves have asked that the fraud and waste of federal funds cease and their fundamental rights finally be recognized. Their near universal call has been for full and accountable self-government, guaranteed by federal support. It is time to heed that call and begin the process of consultation and negotiation leading to new agreements.

Since the first European settlers arrived on this continent, Indians have lost 97 percent of their land and their population has been decimated by military assaults and fatal disease. These attacks were also designed to rob Indians of their very identity, pushing them to relinquish their language, arts and religion. Yet despite brutal oppression and persistent attempts at forced assimilation, Indian cultures and tribal identities remain vibrant, continually strengthened by native community institutions, including governments, schools and religious organizations.

The history of the Indian people convinces us that where federal control has failed, real Indian self-government will succeed. By acknowledging the dignity of our first countrymen, renewing the commitment made to them by the Founding Fathers, and pledging a fresh and full partnership, American Indians can finally inherit the birthright promised them two centuries ago.

ENDNOTES

THE EXECUTIVE SUMMARY:

A NEW FEDERALISM FOR AMERICAN INDIANS

[1] For a brief history of American Indian affairs, *see* Part Two *infra*.

[2] Id.; We, the First Americans, Bureau of the Census, U.S. Department of Commerce, 1989 at pp. 13-14.

[3] For a description of the organization and conduct of the Special Committee, *see* Appendix A *infra*.

[4] *See* Part Three, Chapter 1 *infra* on Indian preference contracting.

[5] *See* Part Three, Chapter 2 *infra* on child sexual abuse in federal Indian schools.

[6] *See* Part Three, Chapter 3 *infra* on natural resources.

[7] According to the Office of Management and Budget, fiscal year 1988 budget authority for all federal Indian programs was $3.314 billion. These figures do *not* include Small Business Administration Section 8(a) contracts or federal funds and benefits that Indian governments or individuals receive on some basis other than their Indian status, such as Social Security or welfare. Federal Funding of Indian Programs, Office of Management and Budget, June 13, 1989. Total Native American income was calculated by multiplying the BIA service population (949,075) by per capita income figures derived from the most recent Census Bureau statistics. Those per capita income figures include all federal funds (both Indian and general) received by Native Americans, as well as wages, salaries, pensions, royalties and state welfare payments. *See* Indian Service Population and Labor Force Estimates, Bureau of Indian Affairs, Jan. 1989; We, the First Americans at pp. 1-28; American Indians, Eskimos, and Aleuts on Identified Reservations and in the Historic Areas of Oklahoma (Excluding Urbanized Areas), Bureau of the Census, U.S. Department of Commerce, PC80-2-1D, Part 1; American Indian Areas and Alaska Native Villages: 1980, Bureau of the Census, U.S. Department of Commerce, PC80-S1-13; General Social and Economic Characteristics—U.S. Summary, Bureau of the Census, U.S. Department of Commerce, PC80-1-C1 at Tables 251, 252.

[8] *See* Part Three, Chapter 6 *infra* on corruption among tribal governmental officials.

[9] Part Three *infra* highlights some notable examples of innovative tribal programs.

[10] *See* Part Three, Chapters 1 and 2 *infra*.

[11] We, the First Americans at pp. 12, 25; Indian Service Population and Labor Force Estimates at p. 1.

[12] *See* Part Three, Chapter 3 *infra*.

[13] *See* Part Three, Chapter 4 *infra* on the Indian Health Service.

[14] *See* Part Three, Chapter 5 *infra* on Indian housing.

[15] *See* Part Three, Chapter 6 *infra*.

[16] Letter, Secretary of the Department of the Interior (E.A. Hitchcock) to President Theodore Roosevelt, Jan. 29, 1907 at p. 5 (S. Doc. 286, *Senate Documents*, Vol. 5, 59th Cong., 2d Sess.); Marvin L. Franklin, Assistant to the Secretary for Indian Affairs, Department of the Interior, Testimony, *Realinement of the Bureau of Indian Affairs Central Office*, U.S. Congress, Senate, Hearings, Subcommittee on Indian Affairs, Committee on Interior and Insular Affairs, 93rd Cong., 1st Sess., June 25, 1973 at pp. 90–208. *See also* Part Two and Appendix B *infra*.

[17] For a brief history of agreements between the United States and Indian tribes, *see* Part Two *infra*.

[18] *Antoine* v. *Washington*, 420 U.S. 194, 202-03 (1975) (holding that 1891 Agreement between United States and Colville Confederated Tribes ratified by Congress has same legal force as treaty).

[19] Id. at 202-04; *United States* v. *Winans*, 198 U.S. 371, 380 (1905).

[20] Under Title 25 of the United States Code, for example, the Secretary of the Interior now has the power to approve tribal constitutions and bylaws, and "the choice of counsel and fixing of fees." 25 U.S.C. § 476. The transfer of legal responsibilities to the tribes will not in any way affect the obligations or federal funding of state, county and municipal governments, school systems or agencies.

[21] In the case of multi-tribal federal agencies or service units, special provisions will have to be negotiated between the federal government and all relevant tribes, perhaps giving each tribe a *pro rata* share of stock in the assets.

[22] The size of each grant should be proportional to the tribe's fraction of the total national BIA service population as of November 1, 1989.

[23] Because new agreements will eliminate many federal jobs, the U.S. government should provide assistance to federal employees (especially Native Americans) who are not rehired by tribal governments or other federal agencies.

[24] The Indian Civil Rights Act provides that tribal governments shall not prohibit the free exercise of religion, or abridge the freedom of speech, press, or the right of the people peaceably to assemble and petition for a redress of grievances; and further applies most of the federal Bill of Rights, as well as other Constitutional protections, to Indian tribes, including *inter alia*, the prohibitions against unreasonable search and seizure, double jeopardy, self-incrimination, cruel and unusual punishment, taking of private property, and denial of speedy and public trial, jury trial for criminal offenses, and equal protection and due process. *See* 25 U.S.C. § 1301 *et seq*.

[25] The OFTR, like the TSGG's, should be funded by an allocation from the federal Indian bureaucracies.

[26] Standards for fiscal accounting should be comparable to those for rural county governments that receive significant federal grants. Each tribe also should be required to publicly report certified financial statements analyzing the budgets of its government and tribally-owned businesses. The OFTR will have to negotiate, on

a tribe-by-tribe basis, the specifics of the transition period, the handling of multi-tribal federal services, and other issues. The OFTR and any tribe with allotted land, in consultation with the allottees themselves, will have to establish appropriate systems to manage allottees' royalty payments.

[27] Report, Working Group on Indigenous Peoples, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, Economic and Social Council, United Nations, Aug. 1989, E/CN.4/Sub.2/1989/36, Annex II; The Sechelt Indian Band Self-Government Act, Bill C-93, The House of Commons, 1st Session, 33rd Parliament, 33-34-35 Elizabeth II (May 21, 1986); The Cree-Naskapi (of Quebec) Act, The House of Commons, 32-33 Elizabeth II (June 14, 1984).

PART TWO

A BRIEF HISTORY OF CONGRESSIONAL INVESTIGATIONS AND AMERICAN INDIAN AFFAIRS FROM 1789 TO 1989

Because the Constitution stipulates that Congress "shall have power . . . to regulate commerce with foreign Nations, . . . and with the Indian tribes," the legislative branch has played a leading role in federal Indian policymaking for two centuries. Senators and Members of Congress have set the terms for the unique political and legal relationship between Native Americans and the United States, and have been responsible for developing federal programs to carry out the government's obligations to the continent's aboriginal people. This congressional responsibility has also extended to investigating and evaluating federal programs and began with the very first Congress in 1789.

President George Washington and the members of the first Congress established a demanding set of policymaking principles for the conduct of Indian affairs. They spoke for a young and untested central government, and yet they insisted that federal officials should take the lead in managing relations with Native Americans. To do otherwise, they believed, would allow local governments to adopt a variety of contradictory policies and would risk conflict, recrimination and chaos.

By declaring that the United States would speak to Indian communities through legal agreements, Washington and the first Congress also sought to emphasize that in the future both native leaders and federal officials would act on the basis of mutual respect and a common desire for a stable, long-term relationship. In adopting the treaty system they rejected a policy based on short-term maneuvering and one-dimensional self-interest. It should not be surprising, then, that in the same year that our first Congressmen and Senators were struggling to transform the ideals of the American revolution into a functioning republic, they also fashioned an ambitious blueprint for an honorable Indian policy.

Unfortunately, expediency—not honor—too often has characterized United States Indian policy during the past two hundred years. In the decades following 1789 federal officials consistently upheld Washington's Indian policy ideals, but during those same years they also confronted a dizzying process of westward expansion and frontier settlement. This process in turn unleashed economic and political shock waves which tore at the nation's institutions and ideals.

During the first half of the nineteenth century, when the persistence of slavery tarnished our national ideals and raging sectarian tensions often poisoned our electoral politics, national chauvinism and timid leaders also conspired to undermine Washington's call for consistency, stablility and fair-dealing in Indian affairs. The era of the underground railroad and the Anti-Catholic Know Nothings was also the era of the forced removal of eastern Indians to lands across the Mississippi.

By the end of the nineteenth century, expediency overwhelmed the Founders' ideals. As military campaigns were conducted against tribes across the West, Congress began to turn from the practice of dealing with native people through their governments. This movement away from formal recognition of tribal governments by treaty and agreement was deliberate, but as it overturned nearly a century of precedent, it occurred gradually.

A "treaty" by Constitutional definition is simply an agreement by the President made "by and with the Advice and Consent of the Senate." Even before the Constitution was written, however, both the Continental Congress and the first American Congress under the Articles of Confederation chose to recognize Indian governments through agreements by treaty. Significantly, the Constitution itself explicitly incorporated the continuing legitimacy of those obligations.

Both historians and the Supreme Court have recognized that the 1871 abolition of Indian treatymaking grew out of sentiment in the House of Representatives that it was being excluded from policymaking, and the courts have held that this meant nothing more than that after 1871 bilateral negotiations with Indians produced documents which, like treaties, were made by the President, but were ratified by both Houses of Congress. In fact, between 1871 and 1909 the United States and the Indian tribes entered into 56 agreements, approved by Congress and carrying the force and effect as treaties. The end of treatymaking, therefore, did not mean the absolute end of federal recognition for native governments.[1]

Nevertheless, in the decades after 1871 Congress turned increasingly to policies which substituted federal paternalism for local self-rule. In 1887 the United States declared that it would begin to "assimilate" Indian people by treating them as individuals. During this tragic era, federal officials sought to replace local leaders with government agents. Both the United States Army and state militia conducted brutal wars to subjugate resistant tribes and substitute federal power in the place of traditional chiefs. Bureau of Indian Affairs' superintendents, who were sometimes corrupt, and federally-subsidized missionaries imposed changes in all aspects of native life.

Only in the last two decades have significant, but cautious, steps been taken toward renewed federal recognition of Indian governments. Resourceful native leaders, heirs of those who survived the domination of the assimilation era, have welcomed these decisions and sought further validation of their claims to sovereignty. However, this process has only begun.

NATIONS WITHIN

ESTABLISHING THE TREATY SYSTEM

The first session of the Senate was called to order as prescribed by the new United States Constitution on Wednesday, March 4, 1789. Lacking a quorum (several members were still enroute to New York in carriages and on horseback), the group quickly adjourned, and did not hold its first formal session for over a month. On April 6 the appearance of Richard Henry Lee of Virginia made it possible for the body to form, count the ballots cast for President and Vice President of the United States and begin work. On May 25, less than a month after the Presidential inauguration, and before the first cabinet officers were confirmed or the judiciary organized, President George Washington forwarded his first executive message to the Senate. It was a report from Secretary of War Henry Knox which contained two treaties between the United States and "certain northern and northwestern tribes" negotiated at Fort Harmar on the Muskingum River the previous winter. These documents forced the young government to decide the basis upon which it would deal with the continent's native people.[2]

Before Secretary Knox's report and its accompanying treaties could be acted upon, however, a second—and far more threatening—treaty problem arose for the Senate to consider. In the Southeast, a powerful confederacy of Creek Indians led by Alexander McGillivray had succeeded in throwing the Georgia and Carolina frontiers into panic. The tribe had allied itself with the Spanish in St. Augustine and was resisting white encroachments on their lands and carrying out raids against outlying counties. McGillivray not only operated with the support of the Spanish, but he had the sympathy of nearby Cherokees and other well-armed (and recently pro-British) tribes.

During the summer of 1789, the President began receiving urgent requests from state officials in Georgia for federal assistance. On August 22, to underscore the importance of the Creek-Georgia crisis, Washington appeared personally in the Senate chambers for the first time since his inauguration. He and Secretary Knox wanted the advice of the Senate. How should they proceed? Should they declare war? Negotiate? Recognize the Creeks by legal agreement? Grave issues of federal unity and national security were at stake. Faced with this threat, the President urged caution. He wrote: "to conciliate the powerful tribes . . . in the southern district, amounting probably to fourteen thousand fighting men, and to attach them firmly to the United States, may be regarded as highly worthy of the serious attention of the government."[3]

After two days with the Senate, Washington persuaded the Senators that the United States should pursue a diplomatic solution to the Georgia conflict. The President dispatched commissioners to Georgia to attempt to negotiate a formal treaty with the Creeks. A Creek Treaty was eventually signed by the President and tribal leaders in New York the following year.[4]

With the Creek experience behind them, the Senators then turned back to the Fort Harmar agreements. Despite considerable sentiment that Indian agreements "have never been solemnly ratified by either of the contracting parties, as hath been commonly practised among the civilized nations of Europe," the Senate stuck to the procedure developed with Washington in the Creek crisis. As the President himself had written, treaties should be adopted with Indian tribes as the United States had with European nations. It was "both prudent and reasonable," Washington noted, that Indian treaties "should not be binding on the nation until approved and ratified by the Government." With an eye to the future, President Washington added, "It strikes me that this point should be well considered and settled, so that our national proceedings, in this respect, may become uniform, and be directed by fixed and stable principles." [5]

The decision to deal with Indians by treaty was not taken lightly or innocently. Treaties came to the first Federal Congress in part because its predecessors—both the Continental Congress which functioned during the beginning of the revolution and the Congress which operated under the Articles of Confederation—followed this custom. But the question of ratification forced the young government to address the significance of its commitments to the tribes. The Senate ultimately endorsed Washington's call for uniform treaty recognition of Indian nations directed by the "fixed and stable principles" of the young republic's overall relations with foreign powers. To act on any other basis, Secretary Knox wrote to the President, "would be a gross violation of the fundamental laws of nature, and of that distributive justice which is the glory of a nation." [6]

CONGRESSIONAL INVESTIGATION IN THE EARLY REPUBLIC

Significantly, when Congress launched its first investigation of the executive branch of government in early 1792, the subject was Indians. And equally significant, when the investigating committee asked, "Why was General St. Clair's army destroyed at the headwaters of the Wabash River?" it was already testing the "fixed and stable principles" which underlay federal Indian policy.

Half an hour before sunrise on the morning of November 3, 1791, a force of about 1,000 warriors attacked an American army of 1,400 soldiers and militiamen under Major General Arthur St. Clair twenty-nine miles north of Fort Jefferson, a newly constructed outpost near the site of modern Greenville, Ohio. Within minutes the attack became a rout; when St. Clair and his remaining troops arrived at Fort Jefferson the following morning, 657 soldiers lay dead behind him, nearly three times the casualties suffered by Lt. Col. Custer's troops 85 years later at the Little Big Horn.

News of St. Clair's defeat reached the new national capital in Philadelphia in early December; the defeated general himself appeared a few weeks later. With the Congress not yet divided between Federalists and Republicans, concern over the disaster did not become a focus of inter-party recrimination. Congress acted slowly. The magnitude of the defeat, however, and St. Clair's own wish to defend his professional reputation finally moved the House of Representatives to act. On March 27, 1792 the House approved a resolution authorizing a committee of seven to conduct an independent inquiry into the entire affair.[7]

Following some initial hesitancy concerning the release of documents from the executive branch, President Washington agreed to cooperate with the investigating committee. Committee clerks copied relevant sections of departmental reports and communications for use as evidence in the inquiry, and witnesses (including the Secretaries of War and Treasury) were called to testify in public sessions. The investigating committee submitted a draft report at the end of the congressional session in May, but action on the report was delayed. When the Congress reconvened in the fall of 1792, all of the principals requested an opportunity to explain themselves. A second round of hearings dragged on through the winter and ended inconclusively on February 26, 1793, when the House voted to disband the committee without adopting its report.[8]

The St. Clair inquiry focused on the conduct of the general himself, the orders he received from the Secretary of War, and the quality of his subordinates, particulary Quartermaster Samuel Hodgdon. The assumption behind the investigation was that skillful leadership (and ample supplies) would have either prevented the conflict or produced an American victory. Clearly, both the investigation and the popular sentiment which supported it accepted the legitimacy of a federal military presence in the Ohio country and favored continued American expansion into tribal areas. Congressmen were not interested in exploring the grievances of the Ohio confederacy which launched the attacks against St. Clair. The Indians' claim that they were not bound by the land cessions made at Fort Harmar would have fallen on deaf ears.

The St. Clair inquiry thus reflects Congress' sense of itself in the 1790's as guardian of federal policy towards Indian tribes as well as its susceptibility to pressure from advocates of national expansion. The investigation responded to dissatisfaction with the prospects for American settlement rather than complaints about the treaty system itself. When, during the debate on whether or not to conduct an investigation of St. Clair's defeat, one North Carolina congressmen cried that "justice to the public, . . . demands an inquiry," he was speaking for those who, in the decades ahead, would exert increasing pressure on federal officials to subsidize further frontier settlement and to abandon their commitment to "fixed and stable principles." [9]

CONGRESSIONAL INITIATIVES IN THE REMOVAL ERA

As the nineteenth century began, federal Indian policy appeared to be operating on two parallel tracks. On the one hand, American officials endorsed the formal recognition of tribal groups through treaties. Between 1800 and 1825, 113 Indian treaties were ratified by the U.S. Senate. On the other hand, Indian-white relations continued to reflect the political power of frontier settlers and their representatives in Congress. The victory of General "Mad" Anthony Wayne at Fallen Timbers in Ohio in 1794 avenged St. Clair's defeat and "opened" the Northwest Territory for American settlement. In a similar sequence a decade later, William Henry Harrison combined delicate diplomacy with brute force to reduce the areas of tribal influence in Indiana and Illinois. His actions spurred the remnants of the old Ohio Indian confederacy to rally to Tecumseh and his brother the Shawnee Prophet and to side disastrously with the British during the War of 1812. In the Southeast, many Creeks continued to resist Georgia settlers. They too joined the Redcoats when fighting with the Americans resumed in 1812. These conflicts only added to the anti-Indian sentiment that already existed in frontier areas.

The centerpiece of federal administration of Indian affairs during the early nineteenth century was a series of laws called the Trade and Intercourse Acts. The first of these was adopted in 1790; subsequent versions were adopted until 1834 when a comprehensive form of the act was passed. As the act was revised, an Indian Office was established to oversee relations with the tribes. The Trade and Intercourse Acts followed both tracks of government policy. They were concerned primarily with regulating commerce and movement across the boundaries separating Indian communities and non-Indian settlements, thus implicitly recognizing the presence of tribal entities. At the same time, the acts encouraged the Indian trade and established procedures for acquiring Indian lands. In this sense they accommodated the American public's desire for expansion into native areas.

While no formal investigations of Indian affairs took place during the first quarter of the nineteenth century, congressional committees were frequently drawn into conflicts between settlers, traders and the Indian tribes. Particularly following the admission to the Union of several new states in the wake of the War of 1812 (Mississippi, Alabama, Louisiana, Illinois and Missouri), legislators began casting for a way to accommodate non-Indian settlers and traders without abandoning the Trade and Intercourse Acts' recognition of tribes and treaties.[10]

The most significant congressional inquiry of this period was chaired by Ohio Senator Jeremiah Morrow, who served on both the Committee on Indian Affairs and the Committee on Public Lands. Early in 1817 Morrow submitted a report from the lands committee which proposed to exchange tribal property near white settlements for public lands in isolated areas. When Indians and whites lived close to one another, Morrow noted, "the causes of provocation to hostility . . . are multiplied, and . . . the means of protection and defence . . . diminished." "Removal" of tribes to distant territories, he argued, would "give strength to . . . national defence" and promote the "compact population" of both groups. Morrow concluded his report with the stipulation that his idea "must be effected by negotiation and treaty in the usual manner." During the next decade, Morrow's report would form the basis for a new policy direction in Congress.[11]

Three years after Morrow's report, the House of Representatives called on Secretary of War John C. Calhoun to report on the "progress" of the tribes engaged in trade with the United States. His sentiments mirrored the reasoning in Morrow's report. "It is impossible," Calhoun observed, "that Indians should exist as independent communities in the midst of civilized society. They are not, in fact, an independent people (I speak of those surrounded by our population) . . . ." During the 1820's confrontations between western states and their Indian populations multiplied. The state of Georgia, whose leaders recalled their claims on federal assistance in 1789, acted unilaterally to abolish the government of the Cherokees who lived within its borders. Similar, if less dramatic, crises threatened to break out in Alabama, Mississippi, Indiana and Illinois.[12]

With the election of westerner Andrew Jackson to the Presidency in 1828, and the rising militancy of tribes like the Cherokees and Seminoles, the two tracks of federal Indian policy were destined to collide. If the tribes refused to retreat voluntarily, settler complaints could no longer be satisfied within the framework of the federal treaty system. In Congress, Senators and Representatives continued to grope for a compromise which would satisfy both impatient westerners and the "fixed and stable principles" of treatymaking. An emerging new perspective was articulated most fully by Senator Hugh Lawson White of Tennessee, Chairman of the Senate Committee on Indian Affairs. White's committee issued a long report in February, 1830 arguing for a series of removal treaties with eastern tribes.

White, who had succeeded to Andrew Jackson's Senate seat in 1825, used two arguments in his report. First, he alluded to state sovereignty by noting that the Indians' treaties were with the United States, whereas the laws of the states rested on the independence they had achieved July 4, 1776 on the occasion of their separation from Great Britain. In his view, state laws should take precedence over federal treaties. With sectional tensions beginning to tug at the nation, White's enemies hesitated to contradict his bold defense of state sovereignty. In addition, the Tennessee Senator declared that removal was actually a humanitarian policy. If the tribes resisted removal, he predicted that "the consequences which must inevitably ensue, are such as the humane and benevolent cannot reflect upon without feelings of the deepest sorrow and distress." Two months later the Senate adopted White's proposal by authorizing the President to negotiate removal treaties and to spend up to $500,000 to carry them out. With House concurrence, the Removal Act became law on May 28, 1830.[13]

While the removal of tribes under the 1830 act required substantial amounts of federal persuasion, intimidation and—ultimately—force, the process did not appear to shake Congress' commitment to the treaty system as the principal instrument of federal policy. Even the most notorious removal—the Cherokee "Trail of Tears" to Oklahoma—was accomplished with a treaty, the hated agreement signed by a minority of the tribe at New Echota in 1835. The United States Supreme Court, which became the focus for a final confrontation between Georgia and the Cherokees, adopted a similarly ambiguous position when Chief Justice John Marshall ruled that an Indian tribe did not constitute a "foreign state," but that it was a "domestic dependent nation." [14]

THE EMERGENCE OF RESERVATIONS

Following the tumultuous events of the 1830's, with Indian communities now relocated on the western border of the United States, members of Congress believed they had solved the "Indian problem." The Indian Office became a favorite source of political patronage and tribal affairs receded from center stage in national politics. Policymakers debated the annual appropriations bill, but paid little attention to new initiatives. They believed that the tribes were free to develop undisturbed in their new lands and that they might eventually affiliate in some way with the United States. The House Committee on Indian Affairs, for example, added a proposal to create a western territory for Indians when it adopted a revised version of the Trade and Intercourse Act in 1834, and suggestions for the formation of an Indian state surfaced repeatedly during the next ten years.

This peaceful setting changed dramatically in 1846. Suddenly, in the space of a few months, a war with Mexico and the settlement of the Oregon boundary dispute incorporated 1 million square miles of land and 250,000 additional native people within the revised boundaries of the nation. With new and distant western borders, the United States no longer had a fixed territory where Indians might be resettled.

Congress responded to the sudden expansion of the United States with two administrative reforms. First, four bureaus concerned with domestic affairs—the patent, land, pension and Indian offices—were taken from the Departments of State, Treasury and War to form the Department of the Interior. President Polk's administration proposed the change in the closing days of its term in office, arguing that the responsibilities of the Indian Office had been "vastly increased" with the incorporation of tribes in Texas, Oregon, New Mexico and California into the nation. The change was signed into law on March 3, 1849.[15]

Second, in February, 1851, the Congress approved the creation of three superintendencies to manage the tribes east of the Rockies, and authorized agents to be appointed in New Mexico and Utah. Additional legislation created superintendencies for California, Oregon and Texas. The Indian Office was changing from a bureau to supervise trade and diplomacy with tribes to a nationwide network of superintendents and agents charged with managing small groups who were being engulfed by a surging population of white settlers.[16]

None of the men who served as Commissioner of Indian Affairs during the 1850's came to the post with any experience in the field. Nevertheless, in a response to the national expansion of the day, each commissioner became an advocate of permanent homes—or reservations—for the nation's tribes. As Commissioner George W. Manypenny wrote in 1856, the "wonderful emigration" to the West "blotted" native people out of existence "unless our great nation shall generously determine that the necessary provision shall at once be made, and appropriate steps be taken to designate suitable tracts or reservations of land, in proper localities, for permanent homes for, and provide the means to colonize, them thereon." [17]

With the sectional crisis gradually paralyzing the government during the 1850's, there were few congressional initiatives in any area during the decade. Nevertheless, legislators responded to initiatives from Manypenny and his colleagues. Not only did they support the growth of the Indian Office bureaucracy, but they ratified treaties which came before them. Among these were a growing number of negotiations with tribes living close to American settlement which attempted to provide for their transition to a "civilized" life. As Commissioner Manypenny had suggested, the growth of settler communities near Indian lands, and the influence of non-Indians on Congressional action, promised to undermine old policies in the decades ahead.

THE DOOLITTLE COMMITTEE AND THE END OF TREATYMAKING

During the Civil War the trends that had become evident in the 1850's continued. Behind the dramatic headlines from Gettysburg and Shiloh were a steady stream of reports telling of violence in the West. In August, 1862, the Dakota Sioux in southern Minnesota—who were on the verge of starvation because of the government's failure to supply promised annuities—successfully attacked their local agency and then moved on to raid a nearby Army outpost at Fort Ridgely and the town of New Ulm. During the next two years fighting broke out with Apaches and Navajos in Arizona, with plains and plateau tribes who resisted the intrusion of miners into Montana and Idaho, and with the Cheyenne in Colorado. These conflicts culminated in a surprise attack on a friendly Cheyenne camp by an undisciplined band of territorial militiamen on November 29, 1864. The Sand Creek massacre, in which at least 150 Indian people were slain, seemed to fulfill Manypenny's prediction that the tribes would be "blotted out of existence" if the westward movement continued with no change in federal policy.

The barbarity of the Sand Creek attack, together with the grisly "victory" celebrations which followed it in Denver and elsewhere, prompted Congress to investigate the incident. Not only were regular army officers outraged by the unprofessional conduct of the militiamen involved, but observers of Indian affairs in the churches and in Congress believed the event proved that a broad inquiry was needed into the government's relationship to the tribes. Two investigations into the Sand Creek massacre itself exposed the crimes committed by the Colorado militia. More significant, however, was the joint resolution of March 3, 1865, which created a Special Committee to examine "the condition of the Indian tribes and their treatment by the civil and military authorities of the United States." Senator James R. Doolittle of Wisconsin, a Republican member of the Indian Affairs Committee and the principal sponsor of the March 3 resolution, chaired the new committee.[18]

For the next twenty-two months the Special Committee (made up of three senators and four representatives) conducted an unprecedented review of official actions in all parts of the country. "The work was immense," the Special Committee noted in its final report, "covering a continent." In its initial meeting the special joint committee decided to dispatch three of their number to Kansas, Indian Territory (Oklahoma), California, Oregon, Nevada, Washington, Idaho and Montana; two others concentrated solely on the Pacific Coast, Nevada, Idaho and Montana; and two others took Minnesota, Nebraska, the Dakotas and eastern Montana. A five-hundred-page Appendix to the final committee report contained correspondence and testimony from each of these areas.[19]

Among the evidence the Special Committee gathered was the fact that goods due Indians in Oregon were frequently purchased in New York and shipped via San Francisco and Salem. The result was both fraud (*e.g.*, frying pans of thin sheet iron) and waste ("Spoons enough were brought to give nearly half a dozen to every one of the tribe"). At the Cheyenne and Arapaho reserve, Senator Doolittle asked Agent Samuel G. Colley about the murder of women and children at Sand Creek. The reply: "The officers told me they killed and butchered all they came to." General John Pope, commander of the forces which put down the Minnesota uprising of 1862 testified that "cruel treatment on the part of the whites" undermined Indian communities as much as disease or warfare. And frontiersman Kit Carson spoke for several witnesses when he called for "prompt, decisive, and energetic action." [20]

The Joint Special Committee reached five general conclusions at the end of its labors:

> The Indians everywhere, with the exception of the tribes within the Indian Territory, are rapidly decreasing in numbers. . . .
>
> Indian wars are to be traced to the aggressions of lawless white men. . . .
>
> Even after territorial governments are established. . . the population is so sparse and the administration of the civil law so feeble that the people are practically without any law. . . the boundaries of Indian reservations are wholly disregarded. . . .
>
> The Indian Bureau should remain where it is (and not be re-attached to the War Department).
>
> As the best means of correcting. . . abuses, the committee recommends the subdivision of the Territories and States, wherein the Indian tribes remain into five inspection districts, and the appointment of boards of inspection. . . . Such boards. . . will doubtless sometimes save the government from unnecessary and expensive Indian wars.[21]

The Joint Special Committee rejected the idea that further warfare with Indian communities was desirable or inevitable. The Committee also suggested that better "supervision and inspection" could overcome the lawlessness of the West and reverse the decline in native population. The Committee argued in essence that a new kind of federal intervention was essential for Indian survival.[22]

Six months after the Special Committee's final report, Congress authorized a commission to "establish peace" with the Kiowa, Cheyenne, Sioux and other hostile tribes in the West. During the remainder of 1867, this "Peace Commission" negotiated agreements with the Crow, and all the major Lakota Sioux bands at Fort Laramie, Wyoming, and with leaders of the Kiowa, Comanche, and Apache at Medicine Lodge Creek, in southern Kansas. The Special Committee also had recommended "that the intercourse laws with the Indian tribes be thoroughly revised," preferably by placing tribal affairs in the hands of "an independent bureau or department." In 1869 Ulysses S. Grant gave these concerns Presidential approval by requiring agency appointment be made by Christian churches and promising to "bring all the Indians upon reservations, where they will live in houses, and have schoolhouses and churches, and will be pursuing peaceful and self-sustaining avocations. . . ." Supporters of the idea were quick to label it the "Peace Policy." [23]

As the effort to orchestrate peace on western reservations gained momentum, the House of Representatives, shut out of Indian policy by the treaty prerogative of the Senate, began to assert that there was no longer any need to deal with Native Americans on the basis of the legal form of treaties. The first attempt to abolish treaties occurred in 1867 when an amendment was offered to the annual Indian appropriations bill stipulating that no further treaties could be made without Congressional authorization. This effort failed because the Peace Commission was in the midst of ongoing negotiations.

The issue continued, however. The House voiced its marked resentment that treaties had allocated power over Indian affairs nearly exclusively to the Senate. The House then added the stipulation that existing treaties would remain in force. In March, 1871, the Forty-First Congress, faced with a House of Representatives determined to exercise equal jurisdiction with the Senate in Indian affairs, inserted a brief rider to the Indian Appropriation Act. It stated:

> That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided further, that nothing herein contained shall by construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.[24]

Despite the formal resolution of 1871, hundreds of previously negotiated treaties remained in force and for over 30 years both Houses of Congress approved 56 additional agreements with tribes. Congress also continued to appropriate money for treaty-mandated annuities and to carry out other provisions regarding boundaries, penalties for trespass and the prerogatives of tribal governing bodies. Moreover, the federal government was specifically authorized to enter into negotiations with individual tribes and to commit the United States to act on the outcome of those proceedings, provided they were approved by a majority of both Houses of Congress.

The Assimilation Era

Despite considerable continuity, it was clear in the last decades of the nineteenth century that a new era of Indian policymaking was at hand. Congress and the Indian Office adopted a growing array of procedures which were designed to destroy the coherence of Indian communities by individualizing and assimilating their people and their property. Spurred by a mixture of humanitarian concern, greed, religious fervor and a sense of cultural superiority, policymakers approved new laws that broke up tribal landholdings, sold off community resources, and incorporated Native Americans into the United States.

Throughout this unhappy century, Indian communities held to traditions and institutions that supported their separate identities. They practiced their religions in secret or adapted them to satisfy federal regulations, they developed new leaders and new emblems of peoplehood, and they continued to resist outsiders who insisted they give up their traditions. Indian life changed dramatically, but native people continued to consider themselves members of distinctive groups and to resist federal paternalism.

SENATOR DAWES AND THE GENERAL ALLOTMENT ACT

During the 1870's and 1880's momentum built in Congress and among the general public for a new federal program that would incorporate Native Americans into the United States and solve the "Indian problem" once and for all. As Helen Hunt Jackson wrote in 1880 in a polemical appeal sent to every Senator and Representative, the time had come for the legislative branch to "cover itself with a lustre of glory, . . . to cut short our nation's record of cruelties and perjuries! . . . to attempt to redeem the name of the United States from the stain of a century of dishonor!"[25]

A seemingly endless round of military humiliations fueled the search for a new approach to Indian affairs. During the 1870's, the U.S. Army found itself both embarrassed by small Indian units such as Chief Joseph's Nez Perce (who led the cavalry on a highly-publicized, four-month chase through Idaho and Montana), or stymied by fierce coalitions of hunting tribes such as the one which destroyed Custer's command in eastern Montana in 1876. These defeats indicated that Americans had failed to win the loyalty of native people, and that after a century of experience, the nation's policymakers had yet to devise a method for dealing effectively and fairly with native communities.

The embarrassment of military leaders and the opposition of many Democrats to the growing size of the patronage-rich and often corrupt bureaucracy at the Indian Office stimulated a concerted effort to transfer tribal affairs back to the War Department. During the 1870's, Army officers argued with increasing vehemence that civilian authorities brought on warfare through their inexperience and corruption. At the same time, the intense political competition of the decade (which included the famous "stolen election" of 1876) encouraged Democrats to attack the Indian Office for assigning Indian agencies to eastern hacks who had no qualifications beyond their Republican party label. Protests like these reached their peak in 1878 when Congress created a Joint Committee to study the matter.

Chaired by Republican Senator Alvin Saunders of Nebraska, the Joint Committee traveled to reservations and military posts in Indian Territory, Texas and Nebraska during the fall of 1878, conducted hearings for two weeks in Washington, D.C., and gathered an enormous body of written testimony from nearly every Indian agency in the country. Despite its efforts, however, the Committee could not escape party politics; it submitted two reports, one (from its Democratic member) favoring transfer, and another (from the Republicans) opposing it. With the battle lines drawn so rigidly on the issue, Congress in the 1880's turned away from the question of transfer and cast about for other solutions.[26]

It seemed that something had to be done. The bulk of the Native American population inhabited federal territories and were a special federal responsibility. White settlements were multiplying in the West as new transcontinental railroads carried thousands of would-be farmers to the Plains, the Southwest and the Pacific. In response, a small group of legislators led by Massachusetts Senator Henry L. Dawes searched for a politically acceptable policy that would save Indians from violence and displacement while allowing white expansion to continue. As with Senator Doolittle nearly twenty years before, Henry Dawes' ideas about Indians were made plain during a Senate Committee investigation of "the condition of Indians." [27]

The investigation was launched in 1884 with a Senate resolution calling on the Indian Affairs Committee to examine the tribes in the Indian Territory (both the resettled eastern tribes and western tribes such as the Cheyenne) and native communities in other areas who were involved in leasing their lands to ranchers. The inquiry was launched in response to mounting pressure to open the Oklahoma lands to non-Indian settlement as well as to claims that tribes were being cheated out of potential income by fraudulent cattle leases.

Senator Dawes submitted the Committee's final report in June, 1886. Rather than an examination of specific complaints, it contained a lengthy discussion of treaty rights and assimilation. Dawes noted that the "civilized tribes" of Oklahoma (Cherokee, Creek, Choctaw, Chickasaw, Seminole) "are so conspicuously in advance of all other North American Indians . . . that it is instructive to understand the real causes of their elevation. . . ." Moreover, the Committee asserted that the achievements of this group could be duplicated elsewhere. In fact, "the time required for this degree of progress will be shortened by the many favoring influences that are now present and at work." But Dawes did not recommend that all tribes be granted independence and the recognition Oklahoma tribes had enjoyed for nearly half a century. He focused instead on the need for private land ownership. He wrote that the direction of future policy was clear: "to reduce the reservations to such limits as will enable the Indians to use what they retain and to vest the titles in individuals." [28]

In February, 1887, in the wake of the Dawes Committee's report, Congress adopted the General Allotment Act, the nation's first piece of general Indian legislation since 1834. The Dawes Act, as it was called, provided for the division of reservation lands into individual homesteads, the extension of U.S. citizenship to all who took a separate allotment, and the sale of all "surplus" real estate (lands remaining after the assignment of homesteads to tribal members). Dawes and his supporters pointed out that the allotment law contained a number of protective features: Indian farms could be neither sold nor taxed for 25 years, surplus land sales required tribal approval, and the entire process would be applied gradually—only at the President's discretion. "If we are to set the Indian up in severalty," Senator Dawes told his colleagues, "we must throw some protection over him and around him and aid him for awhile in his effort; we must countenance the effort; we must hold up his hand." [29]

After 1887 the purpose of federal policy became increasingly the destruction of community self-government and the incorporation of individual Native Americans into the United States. Senator Dawes' humanitarian statements reveal his hope that this process would be gradual and buttressed by government assistance, but over the next three decades the Massachusetts Senator's statements were replaced by the practical voices of men elected to represent the people who were intent on developing the economic resources of the Far West. They believed, as Senator Charles Manderson of Nebraska told his colleagues in the 1890's, "there is no greater friend of the Indian, no man who desires his advancement more than the white man who lives by his side." [30]

EFFORTS TO REDUCE THE FEDERAL ROLE IN INDIAN AFFAIRS

During the remaining years of the nineteenth century, a series of conflicts between western Indian communities and their new, non-Indian neighbors revealed the nature of the advancement Senator Manderson had in mind. Repeatedly, pressure to allot reservations overrode efforts to delay the division of tribal lands and slow the forces of "progress." The most dramatic example of this trend was the forced allotment of the Cheyenne and Arapaho reservation in western Oklahoma Territory. There, a community of over 3,200 people, who a decade earlier had been living off the buffalo, had the misfortune to occupy an area coveted by a surging population of non-Indian farmers. Despite warnings from tribal leaders and Indian Office officials, allotment was forced on the tribes and on April 19, 1892, 25,000 new "neighbors" stampeded onto their "surplus" lands.[31]

In addition to accelerating the pace of allotment itself, western interest in "advancement" also undermined the tribes' ability to negotiate freely for the sale of their surplus lands. Theoretically, lands remaining after every tribal member had received a homestead would be sold to finance future community development. As the severalty process expanded in the 1890's, however, Congressmen began to balk at the prices the government negotiators had agreed to pay for these lands and they refused to ratify the sales. This obstruction was temporary, however, for in 1903 the U.S. Supreme Court ruled in *Lone Wolf* v. *Hitchcock* that Congress could act unilaterally to alter the land sale provisions of a treaty (and, by extension, other statutory procedures) because of its "plenary power" in Indian affairs. In the wake of this decision, tribes had no power to resist surplus land sales approved by Congress, and the pace of reservation "openings" accelerated yet again. As Commissioner of Indian Affairs William A. Jones told the House Committee on Indian Affairs, "The decision in the *Lone Wolf* case will enable you to dispose of land without the consent of the Indians. If you wait for their consent in these matters, it will be fifty years before you can do away with the reservations."[32]

Congressional committees were often aware of the problems which arose when settlers moved rapidly into what had previously been an Indian community. But exposure of Indian suffering did not call the assault on Indian tribes into question. For example, in 1888 the Senate created a Select Committee on Indian Traders to "inquire into the methods of allotting lands in severalty to Indians . . . in the northern portions of Wisconsin and Minnesota." In 1896 a similar investigation was launched on the Osage reservation in Oklahoma. Both committees found that Indians had been cheated (through fraudulent timber sales and unethical local merchants), but both blamed corrupt officials for the problems they encountered; neither panel traced the natives' difficulties to the process of individualizing Indian property.[33]

Congress reaffirmed its commitment to allotment in 1898 when it unilaterally terminated the tribal status of the "civilized tribes" in Indian Territory, and opened the way for Oklahoma to become a state. The tribes there resisted, but by 1907 over 100,000 people had been recorded on the final rolls of the Five Civilized Tribes and 15,794,400 acres of real estate had been assigned to them as homesteads. When Oklahoma entered the union on September 17, 1907, Indian reservations were destroyed.

By 1910 it was clear to most observers that allotment had not brought prosperity to Indian communities. The division of tribal lands and the opening of "surplus" holdings to non-Indians was successfully integrating native resources into the national economy, but the Indians themselves did not appear to have benefited materially from the transaction. As had been the case in the 1890's, however, investigations into social conditions among tribes led legislators to question the administration of federal policies rather than the nature of the policies themselves.

Reflective of legislative attitudes during the years before World War I was the report of a special Joint Commission of Congress to Investigate Indian Affairs, created by resolution on June 30, 1913. Chaired by Senator Joseph T. Robinson of Arkansas, the Commission consisted of three Senators and three Congressmen. Only one member of the group—Senator Charles Townsend of Michigan—was from a state east of the Mississippi. In its report, filed in March, 1915, the Commission pointed to a number of problems afflicting Indian communities (poor health conditions, illegal liquor sales, inadequate Indian schools), and an equal number of problems affecting the administrative efficiency of the Indian Office. Among the latter were: the quality of the department's inspection service, its finance and accounting methods, its policy with regard to Indian reclamation projects, and its handling of grazing leases. While the Commission did not make formal recommendations to Congress, its report suggested a number of modest changes. In the area of health care, for example, the Commission wrote that the "prevailing insanitary conditions of Indian life" would best be improved by enlisting the help of "public-spirited citizens who avow their interest in the welfare of the Indian race, and whose efforts are at present unorganized and therefore somewhat misdirected and unavailing." Similarly, schools would be improved with "practical training and instruction in hygiene and sanitation." The Joint Commission did not address underlying problems such as loss of land, the termination of tribal governments, or the failure of western states to guarantee Indian voting rights.[34]

In 1920 an extensive review of "the condition of Indian affairs in the Southwest and Northwest" submitted by a nine-person subcommittee of the House Indian Affairs Committee reached similar conclusions. After interviewing 189 witnesses and traveling 9,000 miles, the Committee (which included Congressmen from Oklahoma, Arizona, New Mexico, and California) made a series of general recommendations. They urged that all Indians 21 years of age or older who had completed the seventh grade of school "be given certificates of competency and have turned over to them anything due them from the Government and then be required to work out their own salvation." The report also suggested decentralizing Indian Office activities and transferring all Indian forestry and health service activities to the U.S. Forest Service and the U.S. Public Health Service, respectively. Finally, the Committee recommended that "all surplus Indian lands, not necessary for the use of the Indians themselves, should be leased or sold for their benefit and in the interest of all the people of the country." [35]

During the 1920's support for the individual incorporation of Indians into the national population was so strong that legislators and administrators had begun to move more confidently towards issuing final titles to Indian allottees and terminating the federal role in Indian affairs. "As soon as the nation rids itself of dependents," one agency superintendent wrote his superiors in Washington, "the more virile it can become." [36] Such sentiments appealed to Charles Burke, the former Congressman from South Dakota who served as Indian Commissioner from 1921 to 1929, and to legislators who were eager to reduce the federal budget and avoid sensitive racial issues.

It also appealed to a broad cross-section of experts who assembled in Washington, D.C. in December, 1923, at the invitation of Secretary of the Interior Hubert

Work. Dubbed the "Committee of One Hundred," the group had been called together to review all aspects of federal Indian policy. When the group issued its report in 1924, their first recommendation was the "early ending of government activities":

> [Speeding] up the work of the Indian Bureau [would] result in large ultimate savings to the Government through an earlier ending of many if not all of the Government activities for Indian welfare.[37]

Reflecting similar concerns, the Indian Office in 1926 commissioned a private study of conditions among American Indians. Undertaken by the Institute for Government Research (later called the Brookings Institution), this report was completed under the direction of Lewis Meriam. It catalogued the failures of federal policy and reported the grim facts of modern Indian life: low per capita income, high infant mortality rates, poor health conditions and deplorable housing. But the report did not recommend a shift away from the individualistic goals and paternalistic policies of the day.[38]

During 1927 and 1928 the Senate debated creating another investigations subcommittee. Non-Indian reformers, including one outspoken young defender of Indian interests named John Collier, claimed that the Indian Office denied Indians the full rights of citizenship, while legislators like Wisconsin Senator James Frear emphasized the need to end federal supervision. "Congress, . . . must now, . . . enable these wards of the Nation to enter into the privileges and responsibilities of citizenship," Frear told a Senate hearing, adding that this "can never be done under the present archaic, tyrannical, and exploiting system of the Indian bureau."[39]

On February 1. 1928, the U.S. Senate, noting in part that "the control by the Bureau of Indian Affairs of the persons and property of Indians is preventing them from accommodating themselves to the condition and requirements of modern life," authorized the creation of an investigations subcommittee of the Committee on Indian Affairs. The subcommittee was charged with making "a general survey of the condition of the Indians" and exploring "the relation of the Bureau of Indian Affairs to the persons and property of Indians."

Republican Lynn Frazier of North Dakota chaired the new panel. He was joined by one Senator each from Wisconsin and Montana and two from Oklahoma.[40]

The Investigations Committee began holding hearings on the Yakima Reservation in November, 1928. It moved on to California and Utah before returning to Washington, D.C. The following summer found it in Wisconsin and South Dakota. As the hundreds of pages of testimony began to accumulate, however, the only consistent theme in the Committee's deliberations appeared to be criticism of the Bureau of Indian Affairs. Senators heard of waste, mismanagement, health problems and Indian poverty, but few witnesses added anything to the well-established cries for efficiency, fairness, and reform of the mismanaged BIA.

At the end of the Hoover Administration, Congress remained convinced that the incorporation of individual Indians into the United States should be the preeminent goal of federal policy. Despite evidence that native communities were persisting as distinctive enclaves, and that the allotment program had not accomplished its assimilationist objectives, legislators continued to believe that Native American problems were a consequence of faulty administration.

THE INDIAN REORGANIZATION ACT AND THE TERMINATION ERA

Many commentators regard the the passage of the 1934 Indian Reorganization Act as an indication of a shift in federal policy away from assimilation and towards the re-recognition of Indian tribes. While Commissioner of Indian Affairs John Collier, who wrote the proposal which formed the basis for the new law, was a visionary reformer, he was not in tune with congressional sentiment. Congress drastically altered Collier's original bill. In the view of most members of Congress, the Indian Reorganization Act was an ambiguous statute which was largely consistent with previous attempts to "prepare" Indians for incorporation into the United States.

By the spring of 1934 it had become clear that some form of federal action was required to assist Native Americans. The ravages of the Depression only amplified the poverty of Indian communities. Not only were levels of Indian health care, education and income a fraction of the non-Indian average, but the economic devastation of the allotment system had become vividly clear. Between 1887 and 1934 the amount of land in Indian hands had shrunk from 136 million acres to 34 million acres. Of this 102 million acre loss, 40 million acres had gone to tribal members in the form of allotments; the rest had been acquired by non-Indian settlers. Of the 40 million acres of allotted lands, less than half—17.5 million acres—was still owned by Native Americans at the beginning of the Roosevelt Administration.[41]

John Collier's proposal called for an end to all future allotments, but it went far beyond a simple repeal of the Dawes Act. His draft bill granted the tribes substantial political power. He wanted them to organize under charters and to function as "federal municipal corporations." Under his plan, these corporations would acquire all allotments on the death of their current owners, would take over responsibility for administering many federal services within the reservation, would operate courts and would have the power to compel the transfer of government officials from the reservation. In the words of a modern scholar, "self-government virtually leaped from every page" of the document.[42]

In hearings before Senate and House Committees, Collier emphasized the economic advantages to be derived from ending allotment and downplayed the bill's endorsement of tribal governments. This was wise, for his audiences were openly hostile to the Commissioner's wider ambitions. Senator Burton Wheeler, Chairman of the Senate Committee, declared, for example, that the original bill contained "a lot of propaganda and verbiage" and urged Collier to simplify it. He objected as well to the bill's implication that the new tribal organizations would become permanent representatives of Indian communities. As he said in one exchange with the young Commissioner, "What we are trying to do is get rid of the Indian problem rather than add to it." [43]

Wheeler's sentiments are reflected in the law Congress enacted on June 18, 1934. The Indian Reorganization Act declared an end to the policy of allotment, but it severely restricted the powers and the autonomy of the new tribal governments which would operate under its authority. All tribal constitutions would require the approval of the Secretary of the Interior; tribal governments would not have the power to compel the return of allotments to tribal ownership, nor would they be able to force the transfer of government officials or operate courts apart from the existing ones authorized by the Bureau of Indian Affairs. The established federal bureaucracy would remain, powerful and intact. The Indian Reorganization Act did contain appropriations for education and economic development, but the school funds were to be used primarily in vocational training and the tribes were not granted the power to organize as municipal corporations.[44]

While modern commentators have observed that with the I.R.A. "Collier got only half his cake," a legislative perspective suggests that he may have gotten even less than that. The Senate and House Indian Affairs Committees, dominated by representatives of western states, were decidedly unsympathetic to the political reforms contained in the new law. Nevertheless, the Indian Reorganization Act created the possibility for important changes in the decades ahead.[45]

John Collier's influence gradually subsided during his remaining eleven years in office. As tribal governments were organized and began to function, the Congressmen and Senators who had supported Collier's reforms began to oppose him. In fact, the investigative subcommittee of the Senate Indian Affairs Committee, which had begun under Lynn Frazier in 1928, continued to meet throughout the 1930's and became a forum for airing complaints against Commissioner Collier. The high point of these efforts came in the spring of 1937, when an entire set of hearings was devoted to the failings of the current BIA administration. During this event, O.K. Chandler, a Cherokee leader of the American Indian Federation, called for the Commissioner's removal because of his "atheism, communism, and un-Americanism in the administration of the Bureau of Indian Affairs." This opposition continued, but Collier remained—embattled—until 1945. In 1944 the Senate Indian Affairs Committee approved a bill to repeal the Indian Reorganization Act, but the Senate never acted on it.[46]

Despite their inability to rescind the Indian Reorganization Act, Collier's opponents gained support for terminating all federal support for Indian tribes during the immediate postwar years. A number of specific administrative reforms supported this trend. In 1946 Congress responded to the growing number of tribes who wished to file suit against the federal government in the Court of Claims by creating the Indian Claims Commission, a quasi-judicial body that would hear complaints and recommend settlements. While the commission promised Indians a forum for their grievances, it also promised to settle all outstanding disputes quickly and to extinguish all claims against the United States. Similarly, a reorganization of the Bureau of Indian Affairs in 1947 created a series of area offices and decentralized many activities. While the stated purpose of the effort was to increase efficiency, it supported the idea that BIA functions should be scaled back or ended.

Placed on the defensive by nearly a half-century of attacks from impatient legislators, the Bureau of Indian Affairs began to echo its critics' arguments. In 1947, for example, while testifying before the Senate Committee on Civil Service, Assistant Commissioner William Zimmerman was asked how the BIA might reduce its expenses. Zimmerman declared that reducing the number of tribes served by the Bureau would save money; he even produced a list of tribes which could survive without federal financial support immediately.[47] In May 1950, one of Collier's critics, Dillon S. Myer, became Commissioner of Indian Affairs. As the former director of the War Relocation Authority, which supervised the internment of Japanese evacuees during World War II, Myer had no background in Indian affairs and little sympathy for tribal communities. His replacement in the Eisenhower administration, Glenn L. Emmons, a banker from Gallup, New Mexico eagerly continued Myer's policies.

The high point of termination came in the summer of 1953 when Congress adopted House Concurrent Resolution 108 and Public Law 280. The preamble to the House Concurrent Resolution noted that "the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens," and this sentiment pervaded the remainder of the document. It promised to "free from federal supervision" a number of small tribes in California, Florida, New York and Texas and to pursue the termination of others in Montana, North Dakota, Wisconsin and Kansas. Public Law 280 replaced tribal jurisdiction with state jurisdiction in criminal prosecutions arising on most Indian reservations in California, Minnesota, Nebraska, Oregon and Wisconsin. These two laws, and the specific termination of 12 tribes between 1954 and 1962, seemed to indicate that the federal commitment to tribes would continue to deteriorate for the remainder of the twentieth century. There was nothing in these statutes to signal the resurgence of tribes which would characterize legislative and administrative life in the 1960's.

THE ERVIN AND KENNEDY HEARINGS

Most Congressmen and Senators who discussed Indian affairs in the twentieth century assumed tribal communities would soon disappear, but by 1960 it had become obvious that the United States contained very few "Vanishing Americans." In 1900, the U.S. Indian population began to rise for the first time since 1492; by 1960 the census reported 523,000 Native Americans, up 47 percent from 1950. Equally important, Indian communities continued to occupy a visible place in the American social scene. Reservations, of course, were distinctive, but Indian neighborhoods were also visible in cities and in small towns. And despite the restrictions placed on tribal governments by government officials, policymakers in the 1950's were encountering a growing, and increasingly sophisticated, cadre of Indian leaders as they considered new initiatives.

When legislators encountered Indian leaders in the 1950's it was usually in the context of opposition to termination. Led by the National Congress of American Indians, an intertribal group formed in 1944, Indian leaders expressed remarkable unanimity on the issue. The goals of assimilation and termination had rested on the assumption that Indians ultimately wanted the same things as other Americans and that their "uplift" would cause them to disappear into the American melting pot. This assumption was contradicted by the persistence of native traditions in the twentieth century, and by the Indians' repeated insistence on recognition as a tribal people. In the spring of 1961, as a new administration took office in Washington, a gathering of over 400 Native American leaders from 67 tribes met in Chicago and issued a statement which renewed this appeal:

> The answers we seek are not commodities to be purchased . . . When Indians speak of the continent they yielded, they are not referring only to the loss of some millions of acres in real estate. They have in mind that the land supported a universe of things they knew, valued, and loved.
>
> With that continent gone, except for the few poor parcels they still retain, the basis of life is precariously held, but they mean to hold the scraps and parcels as earnestly as any small nation or ethnic group was ever determined to hold to identity and survival.
>
> What we ask of America is not charity, not paternalism, even when benevolent. We ask only that the nature of our situation be recognized and made the basis of policy and action.[48]

It was in this context that two Senate Committees set out to investigate aspects of tribal life during the 1960's. In 1961 the Senate Judiciary Committee authorized Senator Sam J. Ervin of North Carolina to conduct a series of hearings on the constitutional rights of American Indians. Fueled by a mixture of sympathy for Indians and a concern that the contemporary civil rights movement was paying too much attention to his native South and ignoring "the minority group most in need of having their rights protected," Ervin embarked on this project with the goal of bringing tribal governments in line with the United States Constitution. The focus of his concern were the tribal courts, institutions which had been created originally by the Bureau of Indian Affairs to maintain "law and order" on the reservations.[49]

In four years of intermittent hearings Ervin produced ample evidence that tribal courts did not conform to legal practice. Defendants were rarely advised of their rights or represented by lawyers, and tribal judges had little formal training. But Ervin also learned that local BIA officials either manipulated or ignored the institution's proceedings, and that states such as California and Minnesota which had been given jurisdiction over Indian reservations under Public Law 280 had either discriminated against, or ignored, native communities. The constitutional rights of Indians appeared to have been violated by state and federal authorities as well as by the tribes.[50]

In 1965 Senator Ervin introduced nine bills to "provide our Indian citizens with the rights and protections conferred upon all other American citizens." The North Carolina legislator's proposals focused primarily on reforms which served to bring tribal governments in line with the United States Constitution. He wanted tribal government actions to be subject to the same limitations as those imposed on the federal government, and he wanted defendants to be allowed to appeal tribal court convictions to federal courts. But equally significant, Ervin also recognized the failures of the states and the BIA. He proposed that no more states be granted criminal jurisdiction over Indian reservations without tribal consent, and that federal officials take steps to improve the administration of justice on the reservations.[51]

While superficially appealing, Ervin's blanket approach to tribal court reform brought forth resistance from the Interior Department and many tribes. Interior Solicitor Frank J. Barry, for example, pointed out to the Senator that "the people of Indian tribes have their roots in an entirely different culture." For example, the 15th amendment—which guaranteed voting privileges without regard to race—would present problems for tribes which typically decided citizenship on the basis of one's degree of Indian ancestry. Procedural guarantees such as a defendant's right to counsel or a jury trial would also place financial strains on the tribal courts.[52]

Ervin's bills were debated off and on from 1965 to 1968, years when the nation at large was deeply involved in issues of civil rights and the recognition of minority peoples. In this setting it was difficult for Congress to overlook or ignore criticisms voiced by Indians and BIA officials. Moreover, as the discussion progressed, the subject shifted subtly from the issue of how to "improve" tribal courts and governments, to how the federal government might reform these institutions while demonstrating its sensitivity to the continuing viability of Indian cultures. Thus, when Ervin's bills won Congressional approval as the Indian Civil Rights Act of 1968, it contained a number of provisions important to tribal leaders and Native American activists.

Rather than issue a blanket requirement that tribes conform to the U.S. Constitution, the Indian Civil Rights Act listed ten specific limitations on the power of tribal governments. It also amended Public Law 280, requiring tribes to consent to any further extensions of state jurisdiction over them, ordered the BIA to create a model code for the administration of justice on reservations, and stipulated that tribal contracts for legal counsel would be automatically approved unless they were cancelled by the Secretary of the Interior within 90 days of being signed. Recognizing that some Indian governments are theocratic, the law also exempted tribes from the constitutional prohibition against the establishment of religion. In addition, concern for the tribe's cultural traditions and their small budgets led to an exemption from the requirement of free legal counsel for indigent defendants, and the requirement that civil cases be tried before a jury. The new law and its passage indicated that Congress had moved away from the anti-tribal assumptions of the 1940's and 1950's.[53]

In August, 1967, at precisely the same time that legislators and lobbyists were debating Senator Ervin's proposals for the reform of Indian courts, another Senate investigation of Indian affairs was getting underway. While seemingly unrelated to the Ervin inquiry, Senator Robert F. Kennedy's investigation of Indian education, conducted by the Subcommittee on Indian Education of the Committee on Labor and Public Welfare, began with similar motivations. Just as Ervin wanted to show that Indians were being ignored by liberals who wanted to reform race relations in the South, so Kennedy (who was contemplating a bid for the Presidency) wanted to demonstrate that Lyndon Johnson's vaunted War on Poverty had missed a significant group in American society. And as with Ervin's investigation, Kennedy's inquiry (completed by his brother Edward in 1969) revealed a growing acceptance of tribal governments and tribal communities as permanent features of Indian life. In fact, just as the Ervin Committee eventually produced legislation which strengthened and legitimized tribal courts, so the Kennedy Committee opened the way to tribally-controlled schools.[54]

A week after the Indian Civil Rights Act cleared the Senate, the Kennedy Committee held its first hearing. During the next 18 months it conducted extensive public hearings and staff interviews. Specifically, the committee staff evaluated the educational programs at fourteen schools in New Mexico, Montana, Oklahoma, South Dakota, Kansas, Utah, Alaska, Arizona, California and Nevada. Moreover, the Committee commissioned five studies of different aspects of Indian schooling which were included in its final report.

The Kennedy Committee organized its findings into three areas. First, after reviewing the history of Indian education, it concluded that "the dominant policy of the Federal Government . . . has been one of coercive assimilation." This policy, the Committee reported, had resulted in poverty, social disorganization, waste and "the growth of a large, ineffective and self-perpetuating bureaucracy." Second, the panel's investigation of Indian schooling in public institutions supported the conclusion that these schools were neither sensitive to Indian needs, responsive to Indian parents, or governed by school boards representative of the native population within the community. Third, the Committee found that federally supported schools were poorly funded, ineffective, and misguided. "Teachers and administrators in Federal Indian schools," the Committee wrote, "still see their role as one of 'civilizing the native.' " [55]

The Kennedy Committee made sixty recommendations, including the creation of a Senate Select Committee on the Human Needs of the American Indian, the convening of a White House conference on American Indian Affairs, increased funding for culturally sensitive curricula, and greater supervision of state and local officials who receive federal funds for the education of Native Americans in the public schools. "One theme running through all our recommendations," the Committee concluded, "is increased Indian participation and control of their own educational programs. For far too long, the Nation has paid only token heed to the notion that Indians should have a strong voice in their own destiny." [56]

While L. Madison Coombs, Director of Educational Research at the Bureau of Indian Affairs, labeled the bleak findings of the Kennedy report "unbelievably negative," the Committee's call for greater Indian participation in school administration found general support. Combining a concern for minority cultures, effective testimony from Indian people, and an acute sense that current programs simply did not educate the people they were supposed to serve, the authors of the Committee report presented a persuasive argument for a new departure in federal policy. As a recent study of the history of Indian education concludes, the Kennedy Committee opened the possibility of a system of education "responsive to Indian needs and amenable to Indian control—a development counter to a century of tradition." The Indian Education Act of 1972 represented a congressional endorsement of the Kennedy Committee's findings. The new law required public school districts to involve parents and community members in the administration of federal funds for Indian children. Three years later Congress went farther by approving the Indian Self-Determination and Education Assistance Act which added new requirements for Indian involvement in public school programs receiving federal funds. Additional amendments to these reforms were passed in 1978, all of which promoted the idea of greater community control in Indian schooling.[57]

Legislative sympathy for self-determination in the tribal courts and in Indian education did not, of course, occur in a vacuum. 1969 marked the beginning of a decade of Indian activism: the peaceful occupation of Alcatraz, the sometimes violent confrontation at Wounded Knee, South Dakota, the fishing disputes in Puget Sound, and countless other, less well-publicized incidents across the country reflected a growing willingness on the part of Indian people to demand recognition as distinctive communities within the United States. The U.S. Supreme Court was also a forum for these issues. The Court announced twelve decisions in Indian law during the 1960's; during the 1970's it announced thirty-five, including decisions recognizing tribal fishing rights in the Northwest, agreeing to tribal exemptions from some forms of state taxation, accepting the tribal power to determine its own membership, and spelling out the sovereign status of tribal courts.[58]

The Ervin and Kennedy committees had discovered that federal efforts to dismantle tribes and their legal status had done more harm than good. Without their own courts, Indians had great difficulty managing their communities and resolving internal conflicts. Without community control, federal schools seemed to devolve into bureaucratic, authoritarian holding tanks, and public education became both alien and ineffective. Moreover, this reasoning could be extended to housing, health care and other social services. A variety of ethical, political and practical concerns had driven legislators, government administrators and the general public away from termination and assimilation and had brought them back, full circle, to an acceptance of tribal communities as a permanent part of the American landscape.

The Beginnings of Self-Determination

Congress's new commitment to self-determination was reflected by passage in January, 1975 of Public Law 93-638, the Indian Self-Determination and Education Assistance Act. Declaring a desire for "maximum Indian participation," in programs that would be "responsive to the needs and desires" of native communities, the act granted tribes the power to sign contracts with federal agencies to administer government programs. The tribes responded eagerly to this new opportunity; five years after its passage, 370 contracts were in effect, providing $200 million worth of services to Indian people. While limited by provisions which allowed federal agencies to retain ultimate authority over the approval of these contracts, P.L. 93–638 represented an explicit departure from a century of assimilationist policymaking. Rather than dismantling tribes and individualizing Native American communities, Congress had now recognized that these social and cultural entities were the basis of modern Indian life.

The years since 1975 have been marked by substantial controversy. Indian politicians, commentators and community leaders have charged that the self-determination legislation of the 1970's was an empty promise. Red tape and the perpetuation of federal bureaucracies, inadequate authority, and condescending attitudes have restricted Native American efforts to take control of their communities. In this view even "successful" tribal leaders are simply puppets for non-Indians. The Cherokee Professor of Law Rennard Strickland has said, for example:

> The Indian leader has figured out both how to manipulate, and yet is being manipulated by the . . . bureaucrats. . . . Today the Indian is

> in another medicine show—one where he is not given rations but one where he is given per diem, and plane tickets, and 'programs to manage.' And in the process the administrator and the administered feed upon each other.[59]

Commentators like Strickland have focused their attack on federal administrators and their congressional protectors, arguing that these people support self-determination with rhetoric while working to insure the growth of the existing bureaucracy.

Mirroring these charges is an opposite view that tribal groups have received an unfair and unrealistic amount of government assistance. Led by "backlash" organizations that have frequently formed in response to litigation (such as the Puget Sound fishing rights controversy), this camp rejects what it considers to have been the drastic reforms of the 1970's, and urges a return to the philosophy of termination. Its advocates argue, in the words of former Washington Congressman Lloyd Meeds, that Indians are trying to "convert tribal political aspirations into legal doctrine." These views have entered the congressional arena most prominently in a series of proposals to abrogate treaty-guaranteed fishing rights or to end federal support for native people.[60]

Despite the existence of these sharply contrasting views, congressional committees and the Congress itself have held consistently—and cautiously—to self-determination as a policy objective. While attacked by some for having moved too quickly, and by others for not having moved at all, legislators have held to a remarkably steady course. In 1975, at the urging of South Dakota Senator James Abourezk, Congress created the American Indian Policy Review Commission. Its 1977 final report drew criticism from both Indian-advocates and terminationists, but its ten volumes of work symbolized congressional concern for the future of tribal communities and kept Indian issues before the public. In 1977 the Senate reestablished its Select Committee on Indian Affairs to oversee legislation affecting native people. In 1976 the Indian Health Care Improvement Act extended the ideas of the 1975 Self-Determination Act to a new area of tribal services by encouraging native organizations to manage their own clinics and hospitals. Other legislation has built on these precedents by recognizing new tribal institutions and activities. The Tribally-Controlled Community College Assistance Act (P.L. 95–471) has supported the development of higher education within Indian communities, and the Indian Child Welfare Act (P.L. 95–608) gave tribes the authority to supervise adoptions involving their members.[61]

The increasing authority granted tribal governments to administer their own programs, the rise of tribally-controlled colleges and the broad reach of the Indian Child Welfare Act indicate that policymaking since 1975 has turned on a recognition of the viability and enduring value of tribal life.

CONCLUSION

While congressional investigations have been central to Indian policymaking for two hundred years, members of Congress often have not considered the context in which their work has taken place. Pressed by immediate crises and political agitation, congressional investigations have tended to focus on concerns of the moment rather than long-term goals. As a result, inquiries have frequently devolved into partisan contests or superficial tinkering with flawed programs. The constant re-tinkering, restructuring and reorganization failed to deal with profound problems. Also, for most of our history, particularly since the late nineteenth century, congressional investigations have sprung from a belief that Indian tribes are no more than a temporary feature of American social life. The results of these inquiries have therefore often been hostile to the wishes and interests of Native American communities.

In 1989 congressional investigators have the advantage of understanding that we are at the beginning of a new era in Indian policymaking. For the first time in nearly two centuries, a congressional inquiry has occurred in an atmosphere of support for tribal self-determination. Moreover, the Special Committee on Investigations has sought to understand the relationship between administrative problems and the long-range goal of self-determination. Understanding this context, Congress has an opportunity to build on the sequence of the past by using the findings of our current investigation to fulfill the promise of Indian self-government within the United States.

ENDNOTES

A BRIEF HISTORY OF CONGRESSIONAL INVESTIGATIONS AND AMERICAN INDIAN AFFAIRS FROM 1789 TO 1989

[1] U.S. Constitution, Article II, Section 2. "The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties." ***Worcester*** v. ***Georgia,*** 31 U.S. (6 Pet.) 515, 559 (1832) (Chief Justice Marshall). *See also* ***Antoine*** v. ***Washington,*** 420 U.S. 194, 202-03 (1975) (holding that 1891 Agreement between United States and Colville Confederated Tribes ratified by Congress has same legal force as treaty); U.S. Congress, House, *Report with Respect to the House Resolution Authorizing the Committee on Interior and Insular Affairs to Conduct an Investigation of the Bureau of Indian Affairs,* 82nd Cong., 2d sess., Dec. 15, 1952, H. Rept. 2503 at pp. 727-1031. *See e.g.,* ***Choate*** v. ***Trapp,*** 224 U.S. 665 (1912) (holding that Agreement between the United States and the Choctaw and Chickasaw Tribes ratified by Congress in 1898 has the same effect as any treaty and thus is the supreme law of the land); ***Perrin*** v. ***United States,*** 232 U.S. 478 (1914) (Same; 1894 Agreement); ***Winters*** v. ***United States,*** 207 U.S. 564 (1907) (Same; 1872 Agreement). *See also* ***Dick*** v. ***United States,*** 208 U.S. 340, 359 (1907) (Agreement between United States and Nez Perce Indians ratified by Congress in 1894 was valid law "based upon the treaty-making power of the United States"); ***Elk*** v. ***Wilkins,*** 112 U.S. 94, 107 (1884) (Same).

[2] Linda Grant DePauw, ed., *Senate Executive Journal and Related Documents* (Baltimore: Johns Hopkins University Press, 1974), Vol. I at p. 3.

[3] Id. at p. 31.

[4] *Annals of the Congress of the United States* (Washington, D.C.), Vol. I at pp. 66-72.

[5] Id. at p. 81.

[6] *American State Papers: Indian Affairs,* Vol. I at pp. 13-14.

[7] *Annals of Congress,* Vol. III at p. 493.

[8] For a description of the inquiry itself, *see* Arthur M. Schlesinger Jr. and Roger Bruns, *Congress Investigates* (New York: Chelsea House, 1974), Vol. I at pp. 3-17.

[9] Comments of Representative John Steele of North Carolina, *Annals of Congress,* Vol. III at pp. 491-92.

[10] *See e.g.,* the Senate Committee on Indian Affairs report on the factory system, submitted in April 1820. The committee admitted the difficulty of policing the Indian trade and excluding liquor sellers from tribal territories, but concluded that it would be "ine pedient to abolish the present system of Indian trade as it is now es-

tablished by law." *American State Papers: Indian Affairs,* Vol. II at pp. 203–04.

[11] *Report of the Committee on Public Lands on the Importance of Exchanging Indian Land for Public Land in the West, American State Papers: Indian Affairs,* Vol. II at p. 124.

[12] John C. Calhoun to House of Representatives, Jan. 15, 1820, in *American State Papers: Indian Affairs,* Vol. II at pp. 200–01.

[13] U.S. Congress, Senate, *On Indian Affairs,* 21st Cong., 1st sess., 1830, S. Doc. 61 (Serial 193).

[14] The Marshall decisions on Cherokee removal are the subject of a vast literature. For two recent commentaries, *see* Charles Wilkinson, *American Indians, Time and the Law* (New Haven: Yale University Press, 1987) at pp. 54–57; and Milner S. Ball, "Constitution, Court, Indian Tribes," *American Bar Foundation Research Journal,* Vol. 1987, no. 1 (Winter 1987) at pp. 23–24.

[15] Secretary of the Treasury Robert J. Walker, quoted in Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* (Lincoln: University of Nebraska Press, 1984), Vol. I at p. 321.

[16] The 1851 reorganization was authorized by the 31st Congress and is contained in *United States Statutes at Large,* Vol. 9 at pp. 586–87. The impact of national expansion on the Indian Office is discussed in Prucha, *The Great Father,* Vol. I, Chapter 12.

[17] *Annual Report of the Commissioner of Indian Affairs,* 1856 at pp. 571–75.

[18] The first investigation of Sand Creek was conducted by Senator Benjamin F. Wade of the powerful Joint Committee on the Conduct of the War. His report is in S. Rep. 142, 38th Cong., 2d sess., *Senate Reports* (Serial 1214). The second investigation was conducted by General Samuel F. Tappan and is contained in S. Exec. Doc. 26, 39th Cong., 2d sess., *Senate Executive Documents* (Serial 1277). Both reports condemned the militia units that attacked the Cheyenne.

[19] U.S. Congress, Senate, *Report of the Joint Special Committee, January 26, 1867,* 39th Cong., 2d sess., S. Rept. 156.

[20] Id., Appendix at pp. 14, 29, 425, 439.

[21] Id. at pp. 3, 5–9.

[22] Id.

[23] U.S. Congress, House, *Report of the Indian Peace Commissioners, January 14, 1868,* 40th Cong., 2d sess., 1868, H. Exec. Doc. 97; James D. Richardson, comp., *Messages and Papers of the Presidents,* Vol. 7 at pp. 109–10.

[24] The story of the 1871 appropriations rider is the subject of John R. Wunder's "No More Treaties: The Resolution of 1871 and the Alteration of Indian Rights to their Homelands," in John R. Wunder, ed., *Working the Range: Essays on the History of Western Land Management and the Environment* (Westport, CT: Greenwood Press, 1985) at pp. 39–56. Some of the tensions over treatymaking can be discerned in a report submitted to the Senate Committee on Indian Affairs in the spring of 1870 by the Interior Department. In it, Commissioner of Indian Affairs Ely S. Parker argued that it was of "the utmost importance" to realize that "a strict and faithful observance of all the Indian treaties should be maintained by the government, in order to avoid the evils and horrors incident to, as well

as the expense attendant upon, a general Indian war." *See* Letter, Secretary of the Interior to the Chairman of the Committee on Indian Affairs of the Senate, Apr. 29, 1870, 41st Cong., 2d sess., S. Misc. Doc. 136 (Serial 1408).

[25] Helen Hunt Jackson, *A Century of Dishonor,* Harper Torchbook Edition (New York: Harper and Row, 1965, originally published in 1881) at p. 31.

[26] U.S. Congress, House, *Transfer of the Indian Bureau from Interior to the War Department,* 45th Cong., 2d sess., H. Rept. 241 (Serial 1822); U.S. Congress, Senate, *Testimony Taken by Committee Appointed to Consider the Expediency of Transferring the Indian Bureau from the Interior Department to the War Department,* 45th Cong., 3rd sess., S. Misc. Doc. 53 (Serial 1835). The following year a special Senate committee investigated the causes of the Northern Cheyenne "escape" from Indian Territory and the subsequent fighting at Fort Robinson, Nebraska. The Republican-dominated committee issued a report sympathetic to the tribe and critical of the military. U.S. Congress, Senate, 46th Cong., 2d sess., S. Rept. 708 (Serial 1899).

[27] A description of the crisis atmosphere of 1880 and the emergence of a consensus on future directions in policy can be found in Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880–1920* (Lincoln: University of Nebraska Press, 1984), Chapters 1-2.

[28] U.S. Congress, Senate, *Investigation of Condition of Indians in the Indian Territory,* 49th Cong., 1st sess., S. Rept. 1278, Part 1, June 4, 1886 at pp. ii, xiii, and Part 3 at p. xiv.

[29] Quoted in Hoxie, *A Final Promise* at p. 72.

[30] Quoted in Hoxie, *A Final Promise* at p. 149.

[31] Hoxie, *A Final Promise* at p. 153; Donald J. Berthrong, *The Cheyenne and Arapaho Ordeal: Reservation and Agency Life in the Indian Territory, 1875–1907* (Norman: University of Oklahoma Press, 1976) at pp. 148–91.

[32] Quoted in Hoxie, *A Final Promise* at p. 155.

[33] U.S. Congress, Senate, *Investigation of Indian Traders,* 50th Cong., 2d sess., Mar. 2, 1889, S. Rept. 2710 (Serial 2624) at p. i; U.S. Congress, Senate, *Osage Indian Funds,* 54th Cong., 2d sess., Jan 26, 1897, S. Rept. 1336 at pp. 1-5.

[34] U.S. Congress, House, *Joint Commission to Investigate Indian Affairs,* 63rd Cong., 3rd sess., Mar. 2, 1915, H. Doc. 1669 (Serial 6889) at p. 5.

[35] U.S. Congress, House, *Indians of the United States, Field Investigation,* 66th Cong., 3rd sess., H. Rept. 1133 at pp. 1–18.

[36] Quoted in Hoxie, *A Final Promise* at p. 182.

[37] U.S. Congress, House, *Resolution of Committee on One Hundred Appointed by Secretary of Interior and Review of Indian Problem,* 68th Cong., 1st sess., H. Doc. 149 (Serial 8273) at p. 1.

[38] Lewis Meriam *et al, The Problem of Indian Administration* (Baltimore: Johns Hopkins University Press, 1928) at p. 89.

[39] U.S. Congress, Senate, *Hearings on Senate Resolution 341,* 69th Cong., 2d sess. at p. 10.

[40] U.S. Congress, Senate, 70th Cong., 1st sess., S. Res. 79.

[41] These numbers are rounded totals drawn from Leonard A. Carlson, "Federal Policy and Indian Land: Economic Interests and

the Sale of Indian Allotments, 1900-1934," *Agricultural History*, Vol. 57, no. 1 (Jan., 1983) at pp. 33-45; and David M. Holford, "The Subversion of the Indian Land Allotment System, 1887-1934," *Indian Historian*, Vol. 8 (Spring 1975) at p. 18.

[42] Vine Deloria, Jr. and Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (New York: Pantheon Books, 1984) at pp. 68, 71.

[43] Id. at p. 124; Quoted in Alvin M. Josephy, Jr., "Modern America and the Indian," in Frederick E. Hoxie, ed., *Indians in American History* (Arlington Heights, IL: Harlan Davidson, 1988) at p. 251.

[44] Indian Reorganization Act of 1934, codified as amended at 25 U.S.C. § 461 *et seq.*

[45] Prucha, *The Great Father*, Vol. II at p. 962.

[46] U.S. Congress, Senate, Subcommittee of the Committee on Indian Affairs, *Hearings on the Survey of Conditions of the Indian in the United States*, 76th Cong., Part 37 at p. 20496.

[47] This incident is described in Prucha, *The Great Father*, Vol. II at p. 1026. The hearings are contained in *Officers and Employees of the Federal Government*, Hearings before the Committee on Civil Service on S. Res. 41, U.S. Senate, 80th Cong., 1st sess., 1947.

[48] "Declaration of Indian Purpose," June, 1961, quoted in Prucha, *Documents of United States Indian Policy* at p. 246.

[49] Donald L. Burnett, Jr., "An Historical Analysis of the 1968 'Indian Civil Rights' Act," *Harvard Journal on Legislation*, Vol. 9, no. 4 (May 1972) at p. 575. A history of the tribal courts can be found in William T. Hagan, *Indian Police and Judges* (Norman: University of Oklahoma Press, 1966).

[50] Burnett at pp. 577-89.

[51] U.S. Congress, Senate, Subcommittee on Constitutional Rights, Committee on the Judiciary, *Constitutional Rights of the American Indian*, 89th Cong., 1st sess. at pp. 1-2; Burnett at pp. 589-601.

[52] *Constitutional Rights of the American Indian* at p. 17.

[53] The Indian Civil Rights Act is Title II of the Civil Rights Act of 1968; *U.S. Statutes At Large*, Vol. 82 at pp. 77-81.

[54] "After more than a century of Federal paternalism," the Senate Report urging the creation of the committee declared, "some 400,000 American Indian citizens remain trapped in a web of illiteracy and poverty." U.S. Congress, Senate, *Report of the Senate Special Subcommittee on Indian Education, Indian Education: A National Tragedy—A National Challenge*, 91st Cong., 1st sess., S. Rept. 91-501 at pp. 2-3.

[55] Id. at pp. 21, 52, 99-100 and Appendix I.

[56] Id. at pp. xiii-xiv.

[57] Quoted in Prucha, *The Great Father*, Vol. II at p. 1104; Margaret Connell Szasz, *Education and the American Indian: The Road to Self-Determination, 1928-1973* (Albuquerque: University of New Mexico Press, 1974) at p. 196; P.L. 92-318; Prucha, *The Great Father*, Vol. II at pp. 1144-46; *U.S. Statutes*, Vol. 88 at pp. 2213-17; P.L. 95-561.

[58] *See Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978); and *U.S.* v. *Wheeler*, 435 U.S.

313 (1978). For a listing of all U.S. Supreme Court decisions in Indian law from 1959 to 1985, *see* Wilkinson at pp. 123-132.

[59] Al Logan Slagle, "The American Policy Review Commission: Repercussions and Aftermath," in Anthony Brown, *New Directions in Federal Indian Policy: A Review of the American Indian Policy Review Commission* (Los Angeles: American Indian Studies Center, University of California, 1979) at p. 124.

[60] Quoted in Prucha, *The Great Father*, Vol. II at p. 1205.

[61] Edmund Danziger, "A New Beginning or the Last Hurrah: American Indian Response to the Reform Legislation of the 1970s," *American Indian Culture and Research Journal*, Vol. 7, no. 4 (1984) at pp. 74-77; *Mississippi Band of Choctaw* v. *Holyfield*, 109 S. Ct. 1597 (1989).

PART THREE

CHAPTER 1

ECONOMIC DEVELOPMENT AND INDIAN PREFERENCE CONTRACTING

In an attempt to stimulate the growth of Indian businesses and reservation economies, Congress in 1910 enacted the Buy Indian Act, creating a concept called "Indian preference" in contracting. The purpose of Indian preference in contracting is to provide Indian-owned businesses with an advantage over non-Indian businesses in bidding for government contracts, such as housing and road construction, which ultimately benefit American Indians. The success of independent, Indian-owned and controlled enterprises would, Congress believed, promote Indian economic development.[1]

Instead, the Indian preference program has merely fostered the growth of established non-Indian contractors. The Committee found that 19 of the largest so-called "Indian" contractors were in fact controlled by non-Indians who drained the Indian businesses of their profits. Rather than promote the growth of Indian business, the program profited those large non-Indian contractors ready to defraud the federal government and Indian tribes.

The federal agencies that administer the over $200 million a year program—including the Bureau of Indian Affairs (BIA), the Department of Housing and Urban Development (HUD), and the Small Business Administration (SBA)—have totally failed to catch and deter the fraud that has corrupted their programs. Despite repeated warnings, these agencies tolerated the cancer of Indian fronts for decades.

SOME EXAMPLES OF INDIAN PREFERENCE ABUSE

The Committee found that 19 of the largest so-called Indian companies were in fact "fronts," ranging from those which were simply sham companies to functioning businesses whose profits and bonding were secretly controlled by non-Indians. The following case studies are examples demonstrating how and why fronts have come to dominate contracts the federal government lets for Indian work.[2]

NATIVE AMERICAN CONSTRUCTION, INC.

In the late 1970's federal agencies, including BIA and HUD, began increasingly to use Indian preference when letting contracts on Indian reservations. John Paddock was one of the largest construction contractors in Arizona, particularly active on Indian lands, and he soon realized that bidding for Indian contracts was becoming more restricted to so-called Indian businesses.[3]

Paddock approached Don James, a Navajo carpenter, and established Native American Construction, Inc., located in Marana, Arizona, with James as its sole stockholder. Despite its name, the company's bidding was never controlled by Native Americans, nor were Native Americans hired to perform the work on construction contracts awarded to the company. And it certainly was not Native Americans who kept the books or reaped the profits from numerous Indian preference contracts obtained by the company. It was Paddock.[4]

When bidding on work, Paddock and James disguised their true relationship, securing repeated multi-million dollar projects throughout the Southwest, all based on the assumption that Don James was in control of Native American. Although Paddock carefully concealed the details of his relationship with James from the contracting agencies, he boldly described the true concept behind Native American to those who provided its financing and bonding. Indeed, only by persuading his financiers that John Paddock Construction Company was holding the reins of Native American could Paddock obtain the millions of dollars of bonding necessary to bid on numerous Indian preference projects in the Southwest. In a 1987 letter from Paddock to his bonding company, Paddock explained that Native American was merely a "tool" to allow him to bid on Indian preference work. Paddock further revealed:

> Don James has been an employee for the past 10 years . . . When we use [Native American]

> to bid a job, Don ends up with a subcontract to do his carpentry work.
>
> As you can see from the information provided, Don's personal statement does not really mean much. His statement would be, I am sure, not very strong. But since we have full control of the financial management of [Native American], I don't feel concerned with this.[5]

Indian preference was responsible for making Native American a highly successful business, performing tens of millions of dollars worth of government contracts. Yet Native American had no assets or office, and all bookkeeping and accounting functions were controlled by Paddock. James was simply a *de facto* employee of Paddock. Aside from a few carpentry subcontracts, James had no financial stake in the relationship whatsoever. Paddock's company did the work, and its owner took the profits.[6]

Today, at the option of Paddock, Native American has ceased doing business. Paddock has retired from the construction business, and James must now make it on his own. The Indian preference program simply lined the pocket of a non-Indian, leaving an Indian contractor without the income or guidance he has blindly depended upon for the past nine years.[7]

SAVALA ASPHALT AND CONSTRUCTION

At the same time that Paddock created Native American, Indian preference enticed James Bagley, a non-Indian officer of Arizona Refining Company, to Indian country. Bagley's company was involved in the sale and application of petroleum-based road products in Arizona. In the late 1970's Bagley, not unlike Paddock, realized that BIA road construction contracts under Indian preference would increase dramatically, thereby creating new and largely uncompetitive markets for his petroleum road-paving products. All he needed to profit from this specialized market was an Indian shell company.[8]

David Savala, a truckdriver for Bagley's company, was Mexican-American; but his wife, Gevene, was a member of the Kaibab Paiute Indian tribe. In 1980 he was driving a truck for Arizona Refining, and she was working as a health supervisor on her reservation. They had no intention of starting their own company, nor did they have the means to do so.[9]

Bagley approached David Savala with an offer to start a Savala family business. Bagley's plan called for Mrs. Savala to be its 100 percent owner, despite her complete lack of experience in construction and business. He promised Savala's income as a truckdriver would at least double, and that Savala would not have to worry about incurring losses. With these promises, Savala Asphalt and Construction of Glendale, Arizona, was created.[10]

As with Native American, the true relationship between Arizona Refining and Savala Asphalt was concealed. Bagley and Arizona Refining controlled the selection of projects and prepared bids using Savala Asphalt stationery. Once work was obtained, Arizona Refining officers would phone the Savalas and tell them where they needed to appear to perform their duties. They followed their instructions carefully, and David Savala continued doing what he was trained to do—drive a truck and lay petroleum products provided by Arizona Refining.[11]

Arizona Refining guaranteed the bonds obtained by Savala Asphalt, but, in return, required that Savala purchase its petroleum products from Arizona Refining at an exorbitant markup. Not long after receiving its first Indian preference contract, Savala Asphalt's gross income shot up from less than $1 million per year to more than $10 million annually. And the more road contracts obtained by Savala Asphalt, the more products that Arizona Refining could sell them.[12]

In 1986 Arizona Refining was sold, Bagley left the company, and its new owners discontinued Savala Asphalt's bonding. The front company was now abandoned, with devastating results for the Savala family. David Savala was forced, for the first time, to take independent control of the company bearing his name. He made numerous attempts to obtain bonding on his own but was repeatedly rebuffed. The annual volume of contracts performed by Savala Asphalt dropped precipitously and Savala was forced to pay unusually high premiums for what little bonding he could obtain. Today, the Savalas are barely struggling to survive.[13]

Sadly, the case of Gevene and David Savala is far from unique. The Indian wife of one of the three largest contractors in Oklahoma, like Gevene, was used by her husband's business partners to obtain Indian preference work. She was given 100 percent ownership of a sham company and, as a formality, told to present all bids to federal agencies and attend Board of Directors meetings where she had no input. Like Gevene Savala, she had no experience in contracting or even in any business; her non-Indian backers simply exploited the market to the greatest possible extent, and then left her front company bankrupt.[14]

EARLY AMERICAN CONTRACTING

Even Indians with contracting experience, such as Albert Long, the Rosebud Sioux owner of Early American Contracting, Inc., in Rapid City, South Dakota, have been victims of Indian preference abuse. Early American Contracting is currently inactive, and Long is searching for work. Yet at one time, Early American was the envy of South Dakota contractors, building millions of dollars worth of reservation housing under the Indian preference program.[15]

One primary reason for Early American's success in obtaining Indian preference contracts was not apparent on its financial statements. However, if one were to visit Long at the height of Early American's business, he could be found at the offices of R&S Construction, a non-Indian firm in South Dakota. And if the initial corporate documents of Early American were carefully inspected, they would reveal that a majority of Early American's Board of Directors were R&S employees.[16]

In 1981, by agreement, R&S Construction became a "job proctor" to Early American. For the next five years, R&S provided bonding and other support to Long, enabling him to bid for numerous Indian preference projects. But that support was not without its price. For its assistance in bonding, accounting and field consultation services, R&S received 5.1 percent of the gross proceeds plus 49 percent of the net profits for each contract awarded to Early American. According to surety records, Early American lost $115,000 on one project at the Fort Peck Reservation in Montana, while R&S profited $255,000 from the same project. In the long run, Long's relationship with R&S did nothing to further his business. "[A]ll that money, that eight, nine million dollars worth of work—what have I got?" Long told Committee investigators, "Nothing." [17]

BLAZE CONSTRUCTION

Even the largest and most experienced Indian contractor, Blaze Construction, Inc., of Yakima, Washington, received bonding from a non-Indian, while deliberately concealing this relationship from contracting agencies. Blaze was formed by William Aubrey in 1983 and currently performs over $30 million worth of Indian preference contracts per year, making it the largest Indian contractor in the country.[18]

Halverson Construction, a non-Indian firm, originally provided bonding to Blaze and, in return, collected a $200.000 "management" fee plus 49 percent of the net profits for each job, as well as an option to take total control of any job obtained by Blaze. However, Blaze more recently has depended on bonding facilitated by Albert DeAtley, a wealthy, non-Indian contractor who owns several construction firms in Washington State.[19]

In exchange for indemnification services, Aubrey, a one-eighth Blackfeet Indian and the sole shareholder of Blaze, secretly agreed to pay DeAtley 50 percent of Blaze's net profits. Aubrey currently owes DeAtley over a million dollars for bonding fees, and additional millions for loans made by DeAtley to finance Blaze's tremendous growth. DeAtley also holds a hidden security interest in all of Blaze's assets. For years Aubrey and DeAtley successfully concealed their relationship from the contracting agencies, both federal and tribal.[20]

In 1987 the BIA discovered that DeAtley might be assisting Blaze in obtaining bonding. On August 19 of that year, the BIA sent a letter to their bonding company, Seaboard Surety Company, requesting that Seaboard clarify the relationship between DeAtley and Blaze. Seaboard responded cleverly, specifically answering the BIA's clumsily worded questions, but never revealing the true nature of the relationship. BIA never pursued the matter further.[21]

PC&M CONSTRUCTION

Pat Chee Miller was one of the leading construction contractors on the Navajo Reservation. The sole Navajo-owned general contracting business licensed to do residential and commercial work in Arizona and New

Mexico, his company, PC&M Construction of Gallup, New Mexico, was among the only Navajo businesses able to bid and obtain million-dollar contracts. But the price of Miller's success has been deception.[22]

In 1986 Miller and Franz Springer of Springer Construction formed a joint venture to take advantage of Indian preference.[23] They told contracting agencies of their joint venture, but intentionally misrepresented the true details of their relationship. According to documents filed with federal and tribal authorities, Miller was the managing party of the venture, controlled on-site construction, and could ultimately determine how profits and losses would be split between the parties. In reality, Miller and Springer concealed a side-agreement that delegated to Springer all the management duties, powers and obligations of the venture. Their hidden agreement also denied Miller the majority of the joint venture's profits, assigning him instead a fixed salary.[24]

CHUSKA DEVELOPMENT COMPANY

Larry Manuelito, a Navajo schoolteacher without any construction experience, may have inspired Miller and Springer. Twelve years ago Manuelito established what he claims was the first joint venture created to take advantage of Indian preference.[25]

In 1977 Manuelito, through the use of a shell corporation named Chuska Development Company, located in Tahatchi, New Mexico, entered into a joint venture with Morrison-Knudsen, Inc., one of the largest construction firms in the United States. As with Miller's venture, contracting agencies were told that the Indian partner would receive most of the profits of any projects. However, the true financial split was much different. Morrison-Knudsen received, off the top, five percent of total contract revenues for management and bonding, plus an additional four percent if it provided design and architectural services.[26]

Chuska Development had only one employee—Larry Manuelito—and no equipment. Manuelito and Chuska Development were simply a means by which Morrison-Knudsen could qualify for Indian preference contracts.[27]

Manuelito's venture with Morrison-Knudsen ended in 1986 after performing tens of millions of dollars of Indian preference contracts. Manuelito recently entered into another joint venture agreement with Jaynes Corporation, a non-Indian company. Pursuant to an early 1988 agreement between Jaynes and Chuska, Jaynes is to receive, similar to the Morrison-Knudsen deal, a 49 percent net profit share and two percent of gross contract revenues for management services.[28]

M. GREENBERG CONSTRUCTION

Jeff Begay has been the Indian owner of a legitimate Indian firm in Tempe, Arizona. As a true Indian contractor, Begay has struggled to survive. He repeatedly has been sought out by non-Indian contractors intent on profiting from Indian preference work.[29]

In 1985 M. Greenberg Construction, a non-Indian contractor from Phoenix, Arizona, approached Begay with the idea of forming a joint venture to take advantage of Indian preference work. Greenberg proposed that, when a project was obtained by the joint venture, Greenberg would deduct fees for services such as payroll, bonding, financing, and supervision. Begay was to get a mere one percent of the remaining net profits. Begay was offered a loan of $24,000 to invest in the joint venture, with the understanding that he repay this loan from his measly share of the profits.[30]

After being rejected by Begay, Greenberg eventually found an Indian interested in forming a "joint venture"—Guy Gorman of Arizona. Following a scheme similar to the one rejected by Begay, Greenberg received from the gross proceeds of every contract a seven percent "overhead reimbursement fee" as well as a two percent net management fee. When all expenses were paid, Greenberg still received an additional sixty percent of the net profits. It is no surprise that Gorman eventually ended his relationship with Greenberg. Like so many other non-Indian contractors entering into these relationships, self-interest—not fairness—was the prime focus.[31]

K INDUSTRIES, LIVINGSTON, AND DJB ENTERPRISES

Within a four-year period Hunt Building Corporation of El Paso, Texas, a major non-Indian contractor, entered into three separate relationships with different Indians to gain access to the Indian preference markets. As early as 1981, Hunt was involved in a joint venture with K Industries, an Indian concern. An accounting firm reviewed Hunt's accounting procedures and questioned the absence of separate books for K Industries. Apparently, Hunt conducted all the accounting and bookkeeping for K Industries.[32]

In 1985 Hunt created another joint venture, this time with Vemold Livingston, an Indian individual. When obtaining bonding for the venture, Hunt assured representatives from a surety company providing bonding that Livingston had "no control over the work or funds." [33]

On April 8, 1985, Hunt entered into yet another joint venture with DJB Enterprises of Albuquerque, New Mexico. An agreement between the parties called for Hunt to receive seven percent of the contract price as a management fee, in addition to its 51 percent of the joint venture's net profits.[34]

An internal surety company memorandum dated December 5, 1985, provided insight into the reasons for this arrangement:

> Basically, these joint ventures come about to provide the required Indian preference for Indian housing projects. You will note that the joint venture agreement for the bond indicates that Hunt will handle all the joint venture financial resources in management and sets up a mutually agreeable fee for the use of its working capital, bonding capacity, etc. In this way, they have a 51% minority owned joint venture, but all of the control of the job, subcontractors, and financial resources are remaining with the Hunt organization. This particular joint venture is involved with another party 51% Indian who has minimal contracting skills. However, he does have adequate background and experience to pass the scrutiny of the Zuni [tribal] housing authority.[35]

SOUTHWEST INDIAN CONSTRUCTION

Hidden agreements and siphoning profits from Indian fronts have become commonplace in the construction industry. For example, Greg and Peter Mizioch, two non-Indians from Arizona, devised a novel way of opening up Indian preference markets to non-Indian businesses.

In 1988 Southwest Indian Construction, 51 percent Indian-owned and 49 percent held by the Miziochs, was created with the intention that it would obtain Indian preference contracts and be backed by one of three non-Indian companies, depending upon the type of project. For contracts involving specialty items such as fence lines and cattle guards, Southwest Indian Construction would be indemnified by the Miziochs. In return, the Miziochs would receive a subcontract for a majority of the work. Similar arrangements have been made between Southwest Indian Construction and Wheeler Construction for road construction, and between Southwest Indian and C.S. Construction, Inc., for the building of structures.[36]

The Miziochs provided the Indian who "owned" 51 percent of Southwest Indian Construction with a room in their office and gave him "gas money" to travel in search of Indian preference contracts—all for the profit of non-Indians.[37]

INDIAN PREFERENCE ABUSE: A MULTI-AGENCY PROBLEM

By devoting more than two hundred million dollars annually to Indian preference and giving the program little oversight, the federal government has created a market permeated by fraud and abuse. Indian preference markets are dominated by non-Indian backers who, with their wealth and bonding capacity, reap most of the profits and experience. Given such competition, legitimate independent Indian businesses simply cannot survive.[38]

The current abuse of Indian preference pervades all the principal federal government agencies and various tribal agencies, including the BIA, the Indian Health Service (IHS), HUD and the Small Business Administration (SBA).

The Bureau of Indian Affairs distributes over $54 million annually in government contracts subject to Indian preference. Non-Indian contractors such as Arizona Refining and Albert DeAtley have reaped the rewards of BIA road construction projects let under Indian preference. William Aubrey of Blaze, himself quite experienced with non-Indian backing, believes fronting is a substantial problem in BIA projects. Commenting on his experience bidding for millions of dollars of BIA road contracts, Aubrey noted that "most of the [bidders] were not what I term 'real Indian contractors.'" As BIA Indian preference contracts became more common in the early 1980's, the National Association of Indian Contractors' membership grew tremendously. But, in the opinion of the association's president, Edward Danks, at least half of the organization's 200 to 300 members were fronts, not legitimate Indian firms.[39]

In 1988 the Indian Health Service of the Department of Health and Human Services made about $39 million in Indian preference contracts available for bid. John Paddock and Springer are two of the many non-Indian contractors benefiting from those IHS contracts. John Paddock notes that during his experience with Indian preference work, including IHS contracts, he observed at least eight or ten "fronts," such as his own, operating on various reservations.[40]

The Department of Housing and Urban Development let approximately $125 million in Indian preference contracts available for bid in 1988. R & S Construction and Morrison-Knudsen are just two examples of non-Indian contractors that have profited from HUD's program. Jeff Begay, experienced in HUD housing contracts, testified that "a good percentage of my competitors are front companies" and that only "two [Indian-owned construction companies] in Arizona are legitimate Indian companies, out of the five to seven that are presently there."[41]

The SBA's Section 8(a) minority set-aside program, like those of other federal agencies, has been the subject of abuse by contractors involved with Indian preference. "Indian" companies such as Kinross Manufacturing Company in Michigan have fronted for non-Indian interests and have benefited from contracts, including defense work, set aside for firms qualified by SBA as disadvantaged.[42]

Kinross Manufacturing Company has been certified as a disadvantaged Indian business eligible to receive contracting preference pursuant to SBA's 8(a) program. With this status, Kinross has received millions of dollars in minority set-aside Department of Defense contracts to manufacture munitions.[43]

In reality, Kinross is a company controlled by wealthy and influential non-Indians. The main architect of Kinross was Roy Jacobsen, a partner in the Washington, D.C. consulting firm of Gnau, Carter & Jacobsen. Jacobsen's plan used Gerry Blanchard, an individual claiming a tenuous affiliation with the Sault Ste. Marie Band of Chippewa Indians, as the disadvantaged minority applicant in the Kinross organization. At the time Kinross was being formed, Blanchard was a chauffeur for Jacobsen's firm. Blanchard had never been an enrolled member of any Indian tribe until 1983, when he joined the Chippewa tribe for the sole purpose of qualifying Kinross as a disadvantaged firm. Blanchard was later described as "embarrassed" about claiming Indian heritage. He even laughed and joked about it to his associates.[44]

The initial financing of Kinross was a sham. Jacobsen and his firm devised a scheme where the capital for Kinross would be totally leveraged. Initial capital for Kinross was financed by a $2.9 million loan obtained from the Farmer's Home Administration and underwritten by John McGoff, a wealthy non-Indian Michigan businessman. Through two holding companies, McGoff was given, in return, a 39 percent interest in Kinross.[45]

Kinross' 8(a) certification was granted by the SBA over the strong objections of the local office and several staff members in the Chicago regional office. But Kinross had an ally in Richard Durkin, the SBA Regional Administrator and a close friend of Jacobsen. It was Durkin who recommended waiving several SBA rules on behalf of Kinross. In fact, Durkin went to some lengths to orchestrate a conference call enabling Jacobsen to take Kinross' case directly to Durkin's staff.[46]

Durkin's staff, in turn, referred the Kinross application to the SBA national office for a waiver of rules and final acceptance. Robert Saldivar, the Deputy Associate Administrator for SBA, explained to one of Jacobsen's former employees that he was very surprised that an application requesting such significant waivers even made it to the national level, but that there was "a lot of pressure to approve it." The Kinross application and its attendant waivers were subsequently approved by SBA, and Saldivar personally delivered the good news to Jacobsen.[47]

THE AGENCIES' RESPONSES

The BIA, IHS, HUD and SBA have all been negligent in ensuring that firms qualifying for Indian preference contracts are, in fact, legitimate Indian firms. In the past 31 years, only two companies have been disqualified from Indian preference eligibility by the BIA. Moreover, only one of the 19 companies investigated by the Committee was ever questioned by BIA officials. In addition, HUD has never disqualified a single company for being a front firm. By contrast, in just eight months, the Special Committee identified 19 instances of fronting involving high-volume Indian contractors.[48]

In fact, BIA was warned earlier about the potential for massive fraud in its Indian preference road construction program. In a 1987 internal memorandum to the Deputy to the Assistant Secretary for Indian Affairs (Office of Trust and Economic Development), the Chief of BIA's Division of Transportation criticized the BIA for its unwillingness to decertify rampant illegitimate Indian preference contractors. The memo provided numerous examples of abuse by Indian preference contractors and warned that the BIA's "road construction program nationwide is open to the possibility of massive fraud in [Indian preference] contracting." The memo went on to warn that the consequence of "no action" by BIA officials "will almost certainly result in a financial scandal which will call into question the ability of BIA to manage this program." [49] Acting Assistant Secretary for Indian Affairs Pat Ragsdale admitted in his testimony that the BIA Division Chief's memo warning of massive fraud and financial scandal presaged in broad contours what the Committee found.[50]

Yet these warnings went unheeded, and today any construction firm can qualify for Indian preference in BIA contracts by simply completing a self-certification form and sending it to the BIA. The environment is ripe for illicit relationships because no mechanism exists to determine whether front organizations exist. Consequently, BIA lacks data as to whether or not fronting is pervasive. The agency has relied exclusively on the contracting community to police itself, but very few complaints against companies ever reach the BIA Washington office. As Secretary Ragsdale acknowledged, "There is a problem and . . . a breakdown in processes. . . .

[T]he Bureau of Indian Affairs . . . lacks some systems to do adequate follow-up."[51]

Moreover, contracting agencies have either failed to issue guidelines, or if issued, they have proved to be ineffective, confusing and contradictory. In fact, on many occasions, attorneys have opined to their contractor clients that their actions do not necessarily violate Indian preference guidelines, despite the fact that these actions clearly violate the spirit and impede the goals of Indian preference.[52]

In 1986 Chris Evans' attorneys, for example, advised him that he need not worry about entering into an addendum agreement with Jeremiah LeMesa, an Indian contractor and owner of Indian Construction Services, located in Scottsdale, Arizona. Evans, the non-Indian owner of Evcor Construction, had previously entered into a joint venture agreement with LeMesa and, for some time, profited from the venture's numerous Indian preference projects. The new addendum denied LaMesa a majority of the profits by giving him only a set fee per project. Evans' attorneys recommended that he sign the addendum and then withhold it from the contracting agencies. Evans followed his attorneys' advice.[53]

The inconsistent implementation of Indian preference among the different agencies is partially the result of Congress passing two duplicative, yet somewhat contradictory, statutes. Each statute conveys different degrees of authority for implementing Indian preference, and each has been interpreted to require different qualification standards.

The first Indian preference law, the vaguely-written Buy Indian Act of 1910, applies to the BIA and IHS. Although Congress passed the law almost eighty years ago, BIA has never issued final regulations under the Act. The other statute authorizing Indian preference, Section 7(b) of the Indian Self-Determination and Education Assistance Act of 1975, has extended Indian preference to the Department of Housing and Urban Development and tribal governments.[54]

The Buy Indian Act has been interpreted as imposing a duty on the BIA and IHS to enter into prime contracts with Indian-owned companies, while Section 7(b), for other agencies, confers broad discretionary authority in determining if and how Indian preference will be applied. Moreover, the Buy Indian Act does not provide guidance as to what standards must be met by a company qualifying for preference. In contrast, Section 7(b) requires that a firm be at least 51 percent Indian-owned.[55]

CONCLUSION

Almost two decades ago, Pat Chee Miller, a young Navajo, had visions of becoming a successful contractor. Miller hoped that Indian preference would allow him to turn those dreams into reality. But given the sad state of the Indian preference program, Miller learned that his goals were unattainable without deceiving the contracting agencies and becoming dependent on a large, non-Indian contractor.

The stories now circulating in Indian country are of deceptive contractors who have become successful, or of honest contractors whose businesses have failed. Indian preference as currently implemented has provided American Indians little or no real economic opportunity, while encouraging dishonesty and deceit. Only when the integrity of the Indian preference contracting program is restored, will new stories begin to be heard on the reservations—the stories of honest, hardworking Indian contractors who have developed successful and respected businesses that make a real contribution to their tribal communities.

ENDNOTES

ECONOMIC DEVELOPMENT AND INDIAN PREFERENCE CONTRACTING

[1] 25 U.S.C. § 47; Senator John McCain, Co-Chairman, Special Committee on Investigations, Hearings, Part 1, Jan. 31, 1989 at pp. 98-99.

[2] *See* Hearings, Part 1 at pp. 87-214, 481-89 (Jan. 31 and Feb. 1, 1989), and Part 2 at pp. 1-75, 297-320 (Feb. 2, 1989); Kenneth Ballen, Chief Counsel, Special Committee on Investigations, Hearings, Part 3, Feb. 27, 1989 at pp. 250-52.

[3] John Paddock Testimony, Hearings, Part 2, Feb. 2, 1989 at p. 3.

[4] Id. at pp. 3-5; Letter, John Paddock, FAITHCO, to Coroon & Black of Arizona (Debbie), Apr. 27, 1987 (Hearings, Part 2, Feb. 2, 1989 at p. 299).

[5] Id.; Paddock at pp. 5-6; *See* List, "Faithco Ltd; John Paddock Construction, Inc.: List of Construction Projects—Indian Projects Only."

[6] Paddock at pp. 4-5.

[7] Donald James Testimony, Hearings, Part 2, Feb. 2, 1989 at pp. 11, 20.

[8] David Savala Affidavit, Hearings, Part 1, Jan. 31, 1989 at p. 131; James R. Bagley Testimony, Deposition, Jan. 10, 1989 at pp. 6-7, 13-15.

[9] David Savala at pp. 131-33; Gevene Savala Testimony, Hearings, Part 1, Jan. 31, 1989 at p. 136.

[10] David Savala at pp. 131-33; Bagley Deposition at p. 17.

[11] David Savala at pp. 131-34.

[12] Id. at pp. 131-32, 134, 139-40; Louis Day Testimony, Hearings, Part 1, Jan. 31, 1989 at p. 141.

[13] Id.; David Savala at pp. 132, 134.

[14] William Kraig Kendall Testimony, Hearings, Part 1, Feb. 1, 1989 at pp. 178-79.

[15] Richard James Elroy, Special Agent (FBI), Special Committee on Investigations, Testimony, Hearings, Part 1, Jan. 31, 1989 at p. 120; Albert Long Testimony, Deposition, Dec. 21, 1988 at p. 40.

[16] Elroy at p. 120.

[17] Id. at pp. 120-21; Memorandum, Gordon E. Wibbens, Bond Manager, to Home Office Contract Bond Department of the St. Paul, July 20, 1984; Long Deposition at p. 37.

[18] William H. Aubrey Testimony, Hearings, Part 1, Jan. 31, 1989 at pp. 151-56.

[19] Id. at p. 151.

[20] Id. at pp. 151-57.

[21] Id. at pp. 156-57; Letter, Carl Hotubbee, Contracting Officer, BIA, to Terry Dolar, Seaboard Surety, Aug. 19, 1987; Letter, Terry

Dolar, Seaboard Surety, to Carl Hotubbee, Contracting Officer, BIA, Sept. 4, 1987.

[22] Pat Chee Miller Testimony, Hearings, Part 2, Feb. 2, 1989 at pp. 35, 60.

[23] Miller and Springer had entered into a previous joint venture in the early 1980's, but that venture was terminated after performing two contracts. Id. at pp. 26–27.

[24] Id. at pp. 26–28; Franz Springer Testimony, Hearings, Part 2, Feb. 2, 1989 at pp. 36–38; Agreement, Springer Construction Company and P C & M Construction Company, Apr. 10, 1986; Letter, Pat Chee Miller, P C & M Construction Company, to Franz Springer, Springer Construction Company, undated (Hearings, Part 2, Feb. 2, 1989 at pp. 310–11).

[25] Larry Manuelito Interview, Jan. 4, 1989.

[26] Elroy at pp. 123-24; Joint Venture Agreement, Morrison-Knudsen Company, Inc. and Chuska Development Corporation, July 22, 1977, as amended.

[27] Elroy at pp. 123-24; Manuelito Interview.

[28] Id.; Joint Venture Agreement, Jaynes Corporation and Chuska Development Corporation, Jan. 25, 1988.

[29] Over the past four years, Begay has worked hard to see his company, Amerind, grow. But years and many contracts later, Begay has approached a number of Department of Treasury-approved sureties and can obtain bonding only for projects worth less than $500,000. Jefferson Begay Interview, Sept. 15, 1989; Begay Testimony, Hearings, Part 1, Jan. 31, 1989 at pp. 87-100.

[30] Id. at pp. 90, 92, 97-98.

[31] Elroy at pp. 122, 125; Consulting and Services Agreement, Gorman-Greenberg, Inc. and M. Greenberg Construction, June 3, 1983, as amended.

[32] Elroy at p. 125; Letter, Peat, Marwick, Mitchell & Co. to Hunt Building Corporation, Oct. 26, 1981.

[33] United Pacific Insurance Company, Execution Report No. U 38 14 20.

[34] Elroy at p. 125; Joint Venture Agreement, DJB Enterprises and Hunt Building Corporation, Apr. 8, 1985; Memorandum of Agreement, DJB Enterprises and Hunt Building Corporation, Aug. 22, 1986.

[35] Internal Memorandum, Neal Clark, Dallas Bond Department, United Pacific Surety, to Phil Crosetta, Contract Bond Department, Sept. 5, 1985.

[36] Letter, Larry Olsen, K L & K Associates, Inc., to Louis Cassise, Surety Bond Services, July 6, 1988.

[37] Grey Mizioch Interview, Dec. 12, 1988.

[38] Begay at pp. 89-100; Edward Danks, President, National Indian Contractor's Association, Testimony, Hearings, Part 1, Jan. 31, 1989 at pp. 100–13.

[39] Aubrey at p. 153; Danks at pp. 103, 110-11; Kim Armstrong, Procurement Analyst, Division of Contracting and Grants, Bureau of Indian Affairs, Interview, Oct. 17, 1989.

[40] Paddock at pp. 6-7; "Public Health Service: Extramural Awards," Office of the Assistant Secretary for Health, Department of Health and Human Services, FY 1988 at p. 32.

[41] Begay at p. 89; Dominic Nessi, Director, Office of Indian Housing, Department of Housing and Urban Development, Interview, Oct. 17, 1989.

[42] Steven Marica, Assistant Inspector General for Investigations, Small Business Administration, Testimony, Hearings, Part 1, Feb. 1, 1989 at pp. 206, 211-12; Begay at pp. 92-93; Danks at p. 101.

[43] Richard Ramirez Testimony, Hearings, Executive Session, Feb. 1, 1989 at pp. 9-13, 25-29.

[44] Id. at pp. 8-11, 15, 25, 32.

[45] Id. at pp. 10, 22-23.

[46] The Kinross business plan contained elements that required high-level waivers of SBA rules. First, Jacobsen was a former employee of SBA, and the SBA had stringent rules as to the role former employees could play in the plans for a new applicant. Second, Blanchard had a significant lack of business experience. Third, a question existed whether Blanchard would be participating actively in the Kinross business since Blanchard lived in the Washington area and Kinross was to be located in Michigan. Finally, the business plan contained a strong contingency for almost $3 million in financing. Id. at pp. 15-17.

[47] Id. at pp. 17-20.

[48] Donald Asbra, Chief, Division of Contracting and Grants, Bureau of Indian Affairs, Testimony, Hearings, Part 1, Feb. 1, 1989 at p. 197; William "Pat" Ragsdale, Acting Assistant Secretary for Indian Affairs, Department of the Interior, Testimony, Hearings, Part 3, Feb. 27, 1989 at p. 252; Nessi Testimony, Hearings, Part 3, Feb. 27, 1989 at p. 278.

[49] Ragsdale at pp. 253-58; Memorandum, Chief, Division of Transportation, Bureau of Indian Affairs, to the Assistant Secretary for Indian Affairs, Office of Trust and Economic Development, Oct. 13, 1987 (Hearings, Part 3, Feb. 27, 1989 at pp. 254-55). The Committee obtained this document, whose legitimacy was confirmed by top BIA officials, from a confidential source at BIA. The BIA itself never provided the document, despite repeated requests by the Committee.

[50] Secretary Ragsdale testified that "any person with reasonable intelligence reading [the Committee's] transcripts would probably come to that conclusion." Ragsdale at p. 257.

[51] The BIA relies currently upon contracting officers in the field to detect any abuses by companies obtaining Indian preference contracts. However, relying on contracting officers for enforcement has not been effective because they "are basically program people," not investigators. Asbra at p. 201. Determining whether companies violate Indian preference guidelines can require a very complex and detailed investigative analysis of the day-to-day operations and finances of numerous companies. Begay at p. 95; Danks at p. 105; Asbra at p. 201; Ragsdale at p. 257.

[52] The Bureau of Indian Affairs, for example, has never issued final regulations regarding the implementation of Indian preference. The BIA has proposed three different sets of final regulations on Indian preference on three separate occasions, but none have been accepted as final regulations. The BIA published proposed regulations in the Federal Register in 1982 (47 Fed. Reg. 44678,

Oct. 8, 1982), in 1984 (49 Fed. Reg. 45187, Nov. 15, 1984), and in 1988 (53 Fed. Reg. 24738, June 30, 1988); Danks at p. 102.

[53] Chris Evans Interview, Dec. 16, 1988; Addendum To Joint Venture Agreement of Indian Construction Services, Apr. 9, 1986.

[54] Section 7(b) further requires that *all* federal agencies encourage the hiring of Indian firms in subcontracts where the prime contract is for the benefit of Indians. 25 U.S.C. § 450e(b); 25 U.S.C. § 47.

[55] For example, the requirements of Section 7(b) are satisfied if an agency simply includes a provision in the prime contract which states that the prime contractor will make an effort to subcontract, if necessary, with Indian-owned firms. *See In re J&A, Inc.*, 59 Comp. Gen. 739 (Sept. 22, 1980), *In re Department of Interior*, 58 Comp. Gen. 160 (Dec. 22, 1978); 25 U.S.C. § 1452(e). For many years, agencies have been applying different qualification standards for their respective Indian preference programs. Before 1988 the BIA interpreted the Buy Indian Act as requiring 100 percent Indian ownership, whereas 7(b) allowed preference to firms at least 51 percent Indian-owned. Today, IHS requires no less than 100 percent Indian ownership, whereas BIA and HUD now require at least 51 percent.

CHAPTER 2

CHILD SEXUAL ABUSE IN FEDERAL INDIAN SCHOOLS

While child sexual abuse is a growing menace throughout Indian country and indeed across the nation, the Bureau of Indian Affairs (BIA) has ignored the problem in its own schools.[1] There has been a complete administrative breakdown in detecting and reporting pedophile teachers and other employees at BIA schools. BIA has allowed pedophiles to continue teaching even after they were reported to BIA school officials. In fact, BIA administrators repeatedly failed to report child sexual abuse allegations to law enforcement authorities and even threatened persons making allegations with slander suits. BIA's negligence led to needless cases of child molestation, yet many of the negligent officials were actually promoted to higher positions.[2]

Indian children across the country must now bear the burden of BIA's mistakes and suffer the trauma of sexual abuse on reservations where mental health treatment is often unavailable. Lacking access to quality therapy, some former victims of BIA employees have grown up to become child molesters themselves, perpetuating a tragic cycle of abuse.[3] The cases of Paul Price, John Boone, Terry Hester and others illustrate the failure of BIA to fulfill one of its most important responsibilities, namely to Indian children.

THE PAUL PRICE CASE

PRICE AT THE CAMP LAB SCHOOL

Paul Price obtained a teaching certificate in North Carolina and taught at a number of public schools, including the Campus Laboratory School ("Camp Lab") in western North Carolina. In the spring of 1971, unaccompanied by other adults, Price took six of his Camp Lab seventh grade students, all boys, on a weekend camping trip in the Smoky Mountains.[4]

Late Saturday night Price snuck into the tents of several of the boys and sexually abused them. Price even forced one boy to have oral sex with him. When one of the boys who had not been molested that night learned that something strange had happened to his fellow campers, he told his father, Dr. Arthur Justice, the principal of the Camp Lab school.[5]

Shocked by his son's story, Justice confronted Price. At first, Price denied the charges. When Justice, however, threatened to line up the boys who were on the trip and have them tell their stories to his face, Price confessed. Price was fired from Camp Lab and never returned.[6]

PRICE IS HIRED AT CHEROKEE

To his chagrin, Justice discovered in August of 1971 that Price had been hired to teach at the BIA elementary school on the Eastern Band of Cherokee Indian reservation in Cherokee, North Carolina. Although Price listed the Camp Lab school in his employment application to BIA, Bureau officials never contacted Justice or anyone else at the Camp Lab school, and were therefore initially unaware that Price was an admitted child molester.[7]

Justice, undaunted by BIA's apparent lack of concern, was so disturbed that Price had been hired at Cherokee that he sent a strongly worded letter to T.J. DuPree, the BIA principal of the Cherokee Elementary School, disclosing Price's penchant for young boys. Although the BIA did not respond, Justice assumed the matter had been properly dealt with. However, the letter was ignored.[8]

With no fear of his past catching up to him, Price began teaching both third grade children and the children most vulnerable to his unwanted advances—special education students. And no sooner had Price arrived in the classroom than he once again gave in to his "urges" and began molesting young boys.[9]

Price's technique for molesting children was simple, but devious. Price would first target a needy boy who craved attention. These were usually boys who, like himself, had no father or came from a broken home. Price showered these boys with attention, often buying them Cokes, candy bars, and expensive gifts like baseball gloves, bicycles and teddy bears. Getting as close as he could to them, Price coached boys' sports teams, supervised camping trips, ate lunch with his students and even swung with them on his lap in the playground during recess.[10]

Price was visibly affectionate and gave "his" boys hugs, kisses and pats on the behind. Price's secret goal, however, was to win the trust of the boys and then seduce them. Once Price had won their trust, he would strike by placing his hands on both the inside and outside of the boys' clothing and then begin fondling them.[11]

While on the Cherokee school grounds, Price tried to restrict his sexual activities to fondling and to avoid detection, he preferred to teach alone. Price instructed the aides assigned to him to sit behind a screen in the corner of his classroom.[12]

Price was bolder outside school grounds. He masturbated while fondling his child victims and frequently engaged in oral sex with them. Price particularly desired boys between the ages of eight and twelve because older boys "talked too much." [13]

Frightened and confused by Price's advances, the young boys were kept silent by threats. Price told more than one boy, "I'll cut off your penis and turn you into a girl if you tell." [14]

To intimidate young boys, Price sometimes met with his victim's mother and cultivated her friendship. He thought that no parent who perceived him as a "nice" teacher would believe tales of his perversion.[15]

Price began molesting children from the start of his first school year at Cherokee in 1971. Even Price, however, sometimes felt spasms of guilt and stopped his molestation. During these times Price would fight to control his pedophilia, but invariably he would lose control over his urges and once again resume molesting children.[16]

DR. JUSTICE AGAIN WARNS BIA OFFICIALS

In 1974 Justice taught a course for teachers at the Camp Lab school that was attended by two teachers from the Cherokee school. Shocked to learn from them that Price was still teaching at Cherokee, Justice told the teachers that Price "should never be around children." As a result, Justice met with the Chief of the Cherokee tribe, John Crowe, and a tribal councilman, Glenn Bradley, to relay Price's prior history at Camp Lab.[17]

Deeply disturbed by Justice's story, Chief Crowe and Bradley then met with Robert Evans, the highest BIA official at Cherokee, and told him about the Camp Lab incident. Evans promised Crowe and Bradley that he would take action, and suggested Justice write a letter to BIA setting out the facts. Justice wrote the letter, but again received no response from BIA. Moreover, Price himself was not questioned by BIA officials concerning the allegations and freely continued teaching at the Cherokee elementary school.[18]

But Justice's letter led to bizarre consequences. Shortly after the meeting between Evans and the tribal leaders, the teachers at the Cherokee school were called to a meeting by the school principal, Ray Cleveland. He stated that people were spreading rumors about a teacher, and if they did not stop, they would be sued for slander. Reading from a BIA manual, the school's personnel director then listed the penalties for slander, which included dismissal from employment. Frightened by these thinly veiled threats, the two teachers who had learned about Price decided not to press Justice's account any further.[19]

THE ALLEGATIONS CONTINUE

Despite BIA's official myopia, allegations against Price's blatant behavior continued. Throughout the 1970's and early 1980's there were repeated stories that Price was sexually molesting young boys.[20]

Yet whenever there was a complaint, Price was not forcefully questioned by BIA school officials. Instead, he was asked, "You didn't really do this, did you?" and Price's denials were always accepted. The same principal who refused to act on Justice's letter simply mentioned to Price on one occasion that he should "refrain" from touching children. Several BIA supervisors even offered Price friendly advice like "Paul, why don't you get married?" in the hopes that the scurrilous allegations would then cease. But no one reported Price to law enforcement authorities or to their BIA superiors in Washington, D.C.[21]

In 1982 a series of anonymous letters alleging that Price was molesting children circulated among the parents of Price's students. Again, no one at BIA investigated these allegations or reported them to federal law enforcement authorities. By failing to consider allegations, BIA permitted Price to escape detection and continue molesting children.[22]

In November 1984, Price had become so blatant that he began to massage the crotch of one of his third grade students in the school hallway. When Ollie Locust, a teacher's aide, caught him in the act of molesting the child, Price pretended he was simply praising the boy. Deeply shaken by the incident, Locust immediately told her story to the principal of the school, Mary Widenhouse. Widenhouse told Locust that she had done the right thing by reporting the incident, but that it was now "out of your hands." Widenhouse stated that she would have Price "watched" but also told Locust, "I don't want you to say anything about this. You could be hit with a slander suit if you do." [23]

Widenhouse did not report the hallway incident to law enforcement authorities and only indirectly questioned Price. She accepted Price's easy denial, as had all of her predecessors. Price continued to teach the student he molested in the hallway. Widenhouse's only other response to Locust's eyewitness report was to have Price "watched" by another teacher and by the assistant principal, Roy Lambert. As could be expected, BIA's half-hearted attempts to "watch" Price failed.[24]

PRICE IS FINALLY CAUGHT

Keneitha Haigler's son always enjoyed school. From the time he was three years old he wanted to join his sister on the bus that went to the Cherokee school. Suddenly, in the fall of 1985, the eight-year-old boy who loved school began to fear it. "How many days until Saturday?" he asked his mother. On other days the boy would say, "I'm sick and don't want to go." [25]

Then the nightmares began. Awakened by her son's cries in the night and his constant pounding on the walls, Haigler felt an intense fear in her son that she could not trace. The boy's violent drawings of fire, death and destruction also were a troubling mystery.[26]

Late one evening in October 1985, Haigler entered her son's room. The boy was sitting in bed with a blanket over his head. Clearly frightened, he said Price had repeatedly molested him. Price had molested the boy in the classroom, the lunchroom, and even the hallways.[27]

Her worst fears raised, Haigler questioned the Superintendent of the Cherokee Elementary School, John Wahnee. Haigler was dismayed that Wahnee was not surprised by her allegations. In fact, Wahnee explained that windows were being placed in Price's classroom to "discourage" that type of activity. Wahnee instructed Haigler to write a letter detailing her complaint, after which Price was finally reported to law enforcement officials.[28]

Price was suspended from teaching a week after the Haigler allegations surfaced and the FBI began an investigation. Ironically, on his last day of school, Price attended a school Halloween party and wore a prison costume with stripes and a serial number.[29]

While the school was in an uproar over Price's arrest, other accounts of his sexual deviancy came to light. Young boys who before were frightened into silence at last began to tell their stories. The evidence mounted and Price was indicted on 21 counts of taking "indecent liberties" with four minors.[30]

Publicly, Price continued to insist on his innocence, and the case was scheduled for trial. On the day of trial, Price went into the courthouse restroom and when he came out, he faced a line of young boys who stood ready to accuse him. Standing with the boys was a highway patrolman, the same person who twenty years earlier had been molested by Price. Scared by the prospect of confronting those he had abused, Price pled guilty to one count of molesting Haigler's son and was sentenced to the maximum term of ten years in prison.[31]

Price, however, insisted that he was innocent even after his guilty plea, telling his friends that he only pled guilty to save the boys from having to testify. Many of the teachers at the school believed his story and the Assistant Principal, Roy Lambert, flatly refused to apologize to one of the victims' parents even after Price was convicted.[32]

PRICE'S CONFESSION

In April 1989, Price's steadfast protests of innocence broke down. Price, incarcerated in a maximum security prison, confessed, under oath, to Special Committee investigators that he had molested children all of his life, including at least 25 young boys at the Cherokee Reservation. Price admitted that his repeated pattern of molestation at Cherokee began in 1971 and ended in 1985 and that the BIA school officials knew of the allegations for most of his fourteen-year tenure. The fact that they did not pursue them was "a phenomenon that's hard to understand," Price testified. Price candidly acknowledged, "I was waiting for someone to stop me." [33]

Inexplicably, no BIA official at the Cherokee school was ever disciplined for failure to report the allegations concerning Price. Dupree in 1971, Evans in 1974, Widenhouse in 1984 and Wahnee in 1985 all had ample notice of Price's acts. Instead, some of these supervisors gained promotions. Widenhouse was promoted to the BIA's Office of Education in Washington, D.C. Wahnee was promoted to superintendent of schools on the Hopi Reservation. Lambert remains the Assistant Principal of the Cherokee school. Ultimately, supervising a pedophile who molested children at will for 14 years did not harm anyone's career at BIA. As Acting Assistant Secretary for Indian Affairs William Ragsdale testified before the Committee, it was "inexcusable" that the BIA allowed a pedophile like Price to thrive in its schools for 14 years.[34]

THE JOHN BOONE CASE

John Boone was hired in 1979 as a remedial reading teacher at the Polacca Day School, a BIA school on the Hopi Reservation in Arizona. Boone gained the trust of the Hopis during the early 1980's and impressed many with his awards from the BIA for his innovative English-language teaching methods.[35]

Boone was also a favorite of his Hopi students. They liked going to his house to play games and watch videos. Actively involved with the children, Boone coached basketball, volleyball and softball, and frequently took the children on overnight trips for sporting events. Beneath his appearance of normalcy, however, Boone concealed a darker side.[36]

In March 1981, then-Navajo County Deputy Sheriff Larry K. Baldwin learned that Boone was taking Hopi boys between 13 and 18 years old to motels and to his own house. During these excursions, Boone provided alcohol to the boys in a ploy to get them drunk and remove their clothes. On one trip, a boy awakened on a couch in Boone's house to find himself without clothing. Boone, also naked, was staring at him from underneath a table next to the couch. In other cases, when the boys asked why their clothes were removed, Boone told them he had "washed" them because they were "dirty." [37]

Although Baldwin could not get the boys to pursue their allegations, he contacted Thomas Goff, Boone's principal at Polacca. In March 1981 Baldwin met with Goff and told him that Boone was being investigated for sexual molestation of children. Goff replied that without additional evidence, Boone could not be fired.[38]

Five years later, Boone removed the clothes of Debra Hood's ten-year-old son, again ostensibly to wash them because they were dirty. Shocked by Boone's inappropriate behavior, Hood reported the incident to Thomas Goff.[39]

Goff called Boone into his office. After Boone denied the entire story, Goff simply told Hood she had better be "damn sure" of what she was saying or she might ruin Boone's teaching career. Goff then telephoned the BIA Superintendent for Education at the Hopi reservation, Albert Sinquah. Sinquah directed Goff to contact a federal labor relations officer and Boone was placed on a three-day temporary leave.[40]

Despite the previous reports by Sheriff Baldwin against Boone, Goff and Sinquah did not contact any law enforcement officials nor did they notify either their superiors at the Office of Education Programs in Gallup, New Mexico, or the BIA central office in Washington, D.C. The BIA officials simply dropped any further action against Boone. By not pursuing the serious charges against Boone, BIA officials permitted him to continue teaching Hopi children and, consequently, to molest them.[41]

After the 1986 incident, Hood forbade her children from going to Boone's house. In 1987, however, Hood's children began to sneak over to Boone's house because they liked watching videos there. One day Hood's daughter peeked in a window at Boone's house and saw Boone and her brother wrestling. While Boone and her brother were wrestling, the girl entered the house and stole a book entitled *The Sex Book*, which contained explicit pictures and definitions of sexual terms.[42]

Later that night, after Hood's son went to sleep, the girl gave her mother the book and told the disturbing story of Boone wrestling with her brother. Confused about what to do because of the BIA's previous lack of action, Hood contacted a Hopi tribal court counselor, who in turn contacted the FBI. In February 1987, the FBI arrested Boone and made a shocking discovery in his house. Boone had compiled a chart describing the sexual activities he had engaged in with 142 boys. Boone also had photo albums and videotapes of nude boys. Based on this gruesome evidence, Boone pled guilty in June of 1987 and was sentenced to life in prison.[43]

Tragically, the massive abuse at Hopi could have been halted if BIA officials had responded to the serious allegations against Boone. Even so, no BIA official was ever disciplined or reprimanded for failure to report Boone. Neither Goff nor Sinquah suffered any adverse consequences as a result of their reporting omissions. As Co-Chairman McCain stated during the hearings, "Our commitment loses credibility if people who were in supervisory positions are simply transferred to other schools, rather than being held responsible for the actions that took place when they were in a supervisory capacity." [44]

Moreover, the BIA and Indian Health Service response to the mental health crisis created by Boone was wholly inadequate. Instead of implementing crisis intervention plans, as is routinely done in public schools hit by such traumatic events, the BIA had no outreach to the parents of the students for six months.[45]

While the pain and anguish caused by Boone festered within the Hopi community, the BIA employed a counselor at the Polacca Day School, Lee Cargile, who only added to the acute stress of the sexually abused Hopi students. Cargile questioned the students in exhaustive detail concerning the most intimate facts of their abuse and compiled his own chart of Boone's activities. Cargile even called representatives of the U.S. Attorney's Office and asked for money to fly to New York to interview John Boone in prison so that he could write his own book about the Boone case. At the insistence of the U.S. Attorney's Office in Phoenix, Cargile was removed from the Polacca Day School. However, Cargile was not disciplined for his behavior but was simply transferred to the Keams Canyon Boarding School, only eleven miles away. At Keams Canyon, Cargile sometimes acted as principal, supervising some of the same students he had inappropriately questioned at Polacca.[46]

OTHER CASES OF SEXUAL ABUSE

Price and Boone were not the only pedophiles flourishing in BIA schools during the 1980's. Terry Hester applied to BIA in 1981 to teach at the Kaibito Boarding School on the Navajo Reservation. On his employment application to BIA, Hester wrote that he had a previous criminal arrest and listed the relevant Oklahoma statutory code citation. Inexplicably, BIA officials failed to look up the code citation. If they had checked the code, they would have learned that Hester had been arrested previously on a child molestation charge.[47]

Hester escaped detection, however, and was hired by BIA. Rather than seducing boys, Hester's technique was to threaten and coerce them into sexual acts. After Hester was arrested for molesting children at the Kaibito Boarding School, a BIA law enforcement officer finally checked the code and learned that it referred to child sexual abuse. The officer also learned that Hester had "skipped" trial on that charge in Oklahoma and had fled to Arizona. Subsequently, Hester was returned to Oklahoma, where he was convicted. No BIA officials were ever disciplined for their failure to notice Hester's prior arrest.[48]

J.D. Todd also molested children at a BIA school on the Navajo Reservation. Todd taught at the Greasewood Boarding School for twenty-one years. After a new counselor at the school heard stories of Todd's molestation activities from various children, she finally reported him. Todd was investigated by law enforcement officials, but still some of his fellow BIA teachers testified for Todd as character witnesses and otherwise at his trial, claiming that the children were lying. The principal at the Greasewood School even arranged joint transportation to the trial for both the teachers testifying for Todd and the victims of Todd. Only after the U.S. Attorney's Office intervened were the children provided separate transportation.[49]

BIA's Approach To Reporting Child Sexual Abuse

Price, Boone, Hester, Todd and others demonstrate BIA's failure to protect Indian schoolchildren. That these pedophiles could operate in BIA schools with no systematic means of reporting can be traced in part to the failure of BIA to issue any reporting guidelines and Congress' failure to require them to do so. In 1974 Congress passed the Child Abuse Prevention and Treatment Act which mandated that state governments adopt minimum child abuse laws or forfeit federal aid. However, Congress inadvertently omitted federal and Indian lands from this requirement. Thus, BIA schools were exempt from any sexual abuse reporting requirements.[50]

Since the passage of the Child Abuse Prevention and Treatment Act of 1974, all fifty states have enacted and strengthened their own reporting laws. Yet no federal reporting law currently applies to federal schools on Indian lands. Moreover, despite the actions of all 50 states, the BIA for years failed to institute its own reporting guidelines or ask Congress for a mandatory statute.[51]

This regulatory gap tied the hands of the Cherokee tribal leadership in 1974 when it asked BIA to investigate Paul Price. Even today tribes are powerless to require BIA or the Indian Health Service to investigate and report cases of suspected child abuse. Until recently, tribal officials or parents of victims could not even refer to internal BIA policies on child abuse reporting because they were nonexistent. Even though the Price fiasco came to light in 1985, BIA's first official policy on reporting sexual abuse was not issued until December, 1987, and its first policy to strengthen the background checks of potential teachers was not issued until last year.[52]

While the policies BIA has promulgated are an improvement over their previous lack of any reporting procedures, they are still seriously flawed. There are no criminal sanctions for failure to report and no protection from slander suits for those who do report child abuse allegations. Thus, as in the Price case, teachers who know of allegations may be frightened and intimidated into not reporting their information.[53]

A federal reporting law would inevitably lead to increased reports of child sexual abuse and a need for greater treatment services. Unfortunately, the treatment of child abuse victims and offenders is currently underfunded and understaffed. Many reservations have neither licensed medical specialists to provide care to victims, nor mental health professionals to provide counseling. On the Hopi Reservation, the therapists treating the children traumatized by Boone must travel over 300 miles to their clients and are only available four days a month.[54]

Moreover, multi-disciplinary sexual abuse teams trained in the issues of child sexual abuse are rare on Indian reservations. Mental health treatment is not only critical to relieving the depression and suicidal and homicidal ideations that victims experience, but also can help prevent victims from becoming future perpetrators. Paul Price, in fact, was sexually abused at the age of eight and at least two of his victims are now convicted molesters.[55]

CONCLUSION

Collectively, Price, Boone, Hester, Todd, and other cases the Special Committee investigated demonstrate BIA's gross negligence in reporting child molesters to appropriate social service and law enforcement authorities. After the Committee's investigation, Acting Assistant Secretary for Indian Affairs Pat Ragsdale sent official letters of apology from the BIA to the Hopi and Cherokee tribes. As Secretary Ragsdale testified, "I'm sorry it took a Special Committee investigation for us to discover this breakdown in our system." [56]

The administrative breakdown, however, signifies fundamental institutional incompetence. BIA supervisors refused to report credible allegations against their employees and staunchly defended teachers who were later convicted of molestation. With threats of slander against those who pursued allegations, BIA officials stifled detection and intimidated anyone who chose to report allegations. BIA consistently refused to document molestation allegations in the personnel files of accused teachers, and routinely failed to investigate the backgrounds of teachers it hired. Moreover, negligent BIA officials were never disciplined by their superiors and many were even promoted within BIA. Instead of adopting reporting standards, as had all 50 states, the BIA for years failed to address known problems.

ENDNOTES

CHILD SEXUAL ABUSE IN FEDERAL INDIAN SCHOOLS

[1] The Special Committee's examination of child sexual abuse in BIA schools is not intended to de-emphasize the serious problem of physical and sexual abuse of Indian children outside BIA schools.

[2] William "Pat" Ragsdale, Acting Assistant Secretary for Indian Affairs, Department of the Interior, Testimony, Hearings, Part 3, Feb. 27, 1989 at pp. 259-61, 271; Dr. Arthur Justice, Dean of the School of Education, University of South Carolina at Spartanburg, Testimony, Hearings, Part 3, Feb. 21, 1989 at pp. 30-31; Debra Hood Testimony, Hearings, Part 2, Feb. 9, 1989 at p. 274; Ollie Locust Testimony, Hearings, Part 3, Feb. 21, 1989 at p. 23; Elizabeth Brintnall Testimony, Hearings, Part 3, Feb. 21, 1989 at p. 25.

[3] Keneitha Haigler Testimony, Hearings, Part 3, Feb. 21, 1989 at pp. 9-12; Patricia Tramper Testimony, Hearings, Part 3, Feb. 21, 1989 at p. 7; Elizabeth Shiek, Psychologist, Smoky Mountain Health Clinic, Testimony, Hearings, Part 3, Feb. 21, 1989 at pp. 13-14; Roxanne Howard, Juvenile Intake/Court Counselor, Eastern Band of Cherokees, Testimony, Hearings, Part 3, Feb. 21, 1989 at p. 139.

[4] Paul Price Interview, Butner Federal Correctional Institute, Feb. 13, 1989; Justice at p. 29.

[5] Id. at pp. 29-30.

[6] Id.

[7] Id.; Price Interview.

[8] Justice at p. 30.

[9] Price Interview.

[10] Id.; Price Testimony, Deposition, Feb. 13, 1989 in Hearings, Part 3, Feb. 21, 1989 at pp. 318, 320; Locust at p. 28.

[11] Id.; Locust Interview, Jan. 26, 1989. Typical of Price's seduction ploys was his bicycle contest. Price ostensibly conducted the contest for his students as a motivational tool. However, the real price the winner of the bicycle had to pay was consent to Price's sexual abuse. Locust at p. 28; Shiek Interview, Jan. 26, 1989; Lawrence Hill Interview, Jan. 26, 1989.

[12] Hill Interview.

[13] Price Deposition at pp. 317-18; Price Interview.

[14] Tramper at p. 7; Tramper Interview, Jan. 27, 1989.

[15] Hill Interview.

[16] Price Deposition at pp. 317, 320; Price Interview.

[17] Brintnall at p. 25; Brintnall Interview, Jan. 26, 1989; Justice at p. 31; Glenn J. Bradley Testimony, Deposition, Feb. 15, 1989 at pp. 6-8.

[18] Justice at p. 31; Bradley Deposition at p. 8; Price Interview.

[19] Brintnall at pp. 25-26; Justice Interview, Feb. 21, 1989; Bonnie Cogdill Interview, Jan. 26, 1989.

[20] Brintnall at p. 26, Locust at p. 28.

[21] Price Deposition at pp. 320–21; Price Interview.

[22] Price Deposition at pp. 321–22; Mary Widenhouse Testimony, Deposition, Feb. 7, 1989 at pp. 20–21; Price Interview.

[23] Locust at pp. 23–24; Locust Interview.

[24] Widenhouse Deposition at p. 19; Roy Lambert Interview, Feb. 15, 1989.

[25] Haigler at p. 8; Haigler Interview, Jan. 26, 1989.

[26] Haigler at p. 8.

[27] Id. at pp. 8–9; Haigler Interview.

[28] Haigler at pp. 8–9.

[29] Id.; Tramper at p. 6.

[30] Paul Price, Indictment, filed Jan. 7, 1986, Western District, North Carolina, U.S. District Court.

[31] Haigler at p. 17; Tramper at p. 6; Price Interview.

[32] Tramper at p. 6; Haigler at p. 11; Lambert Interview.

[33] Price Deposition at pp. 319–20.

[34] Justice at pp. 30–31; Locust at p. 24; Haigler at p. 9; Ragsdale, Feb. 27 at pp. 259–60. Acting Assistant Secretary for Indian Affairs William "Pat" Ragsdale added that BIA's communication of sexual abuse incidents is "terrible." Id. at p. 262.

[35] Eloise Salholz, "Assault on the Peaceful: Indian Child Abuse," *Newsweek*, Dec. 26, 1988 at p. 31.

[36] Hood at pp. 273–75.

[37] Larry K. Baldwin, former Navajo County Deputy Sheriff, Interview.

[38] Baldwin also reported the allegations concerning Boone to then-Chief of the BIA Police at Hopi, Ivan Sidney. Id.

[39] Hood at pp. 273–75.

[40] Id.; Kenneth G. Ross, Assistant Director, South and West Agencies, Education Operations, Office of Indian Education Programs, BIA, Prepared Statement, Hearings, Part 3, Feb. 21, 1989 at p. 349.

[41] Ragsdale, Feb. 27 at p. 260; Albert T. Sinquah, Prepared Statement, Hearings, Part 3, Feb. 21, 1989 at p. 357.

[42] Hood at p. 275.

[43] Id.; David Small, Supervisory Special Agent, Phoenix Division, FBI, Testimony, Hearings, Part 3, Feb. 21, 1989 at pp. 41–42; Hood Interview, Feb. 9, 1989.

[44] Senator John McCain, Co-Chairman, Special Committee on Investigations, Hearings, Part 11, June 8, 1989 at p. 12; Ragsdale, Feb. 27 at p. 260; Hood Interview.

[45] "Sylvia" Testimony, Hearings, Part 2, Feb. 9, 1989 at p. 280; Hood Interview. William Mehojah, Branch Chief, Office of Indian Education Programs, BIA, testified that BIA has never engaged in crisis intervention. Mehojah Testimony, Hearings, Part 3, Feb. 21, 1989 at p. 90.

[46] David Breault, Clinical Social Worker, Testimony, Hearings, Part 3, Feb. 21, 1989 at p. 114; Ross at p. 82; Ragsdale, Feb. 27 at p. 260; Breault Interview, Feb. 21, 1989.

[47] Mehojah at p. 75.

[48] Id.; Ross at p. 92; Small Interview, Feb. 21, 1989.

[49] Small at p. 42; Christine Brown, Assistant Branch Chief, Indian Education Programs, BIA, Testimony, Hearings, Part 3,

Feb. 21, 1989 at pp. 89-90; Brown Interview, Feb. 21, 1989. After a lengthy jury trial, Todd was found guilty in an Arizona federal district court on thirteen counts of sexual molestation and was sentenced to 99 years in federal prison. However, the Ninth Circuit Court of Appeals ordered a new trial because the children could not precisely identify the dates of the sexual abuse and the jury's factual determination was held to have been improperly influenced by the prosecution's use of an expert witness who presented testimony on the trauma of sexual molestation.

[50] 42 U.S.C. § 5101; Howard Davidson, National Legal Resource Center for Child Advocacy and Protection, Testimony, Hearings, Part 3, Feb. 22, 1989 at pp. 128-29.

[51] Id.

[52] Hilda Manuel, Chief Judge, Tohono O'Odham Judiciary, Testimony, Hearings, Part 11, June 8, 1989 at p. 32; Ragsdale, Feb. 27 at p. 261; Bradley Deposition at pp. 6-8.

[53] Justice at p. 32. Acting Assistant Secretary Ragsdale noted, "I would agree with the Secretary [Lujan] that I think federal legislation is needed to provide criminal penalties [for failure to report] as well." Ragsdale Testimony, Hearings, Part 11, June 8, 1989 at p. 13.

[54] The number of criminal complaints in South Carolina increased by 20 percent after the state enacted a mandatory sexual abuse reporting law. Justice at p. 33; Kenneth Hodder, Clinical Social Worker, Testimony, Hearings, Part 3, Feb. 22, 1989 at p. 107; Hodder Interview, Feb. 21, 1989.

[55] Shiek at p. 15; Price Interview; Shiek Interview.

[56] Ragsdale, Feb. 27 at p. 250; Ragsdale, June 8 at p. 12. *See* Letter, William Ragsdale, Acting Assistant Secretary for Indian Affairs, U.S. Department of the Interior to Ivan Sidney, Chairman, Hopi Tribe, Hearings, Part 3, Feb. 27, 1989 at pp. 675-76.

CHAPTER 3

THE FEDERAL GOVERNMENT AND AMERICAN INDIAN NATURAL RESOURCES

Natural resources are among the most important assets to American Indians and indeed represent the key to economic development for many.[1] In 1987, American Indians received more than $88 million from crude oil and natural gas production alone on their lands. These payments are made both to tribes with oil and gas interests and individual Indian owners, called "allottees," and often represent their primary source of income.[2] Yet despite the federal government's longstanding obligation to protect Indian natural resources, they have been left unprotected, subject to, at best, benign neglect and, at worst, outright theft by unscrupulous private companies.

The Theft of Oil and Natural Gas

The Committee found that simple "smash-and-grab" theft—stealing entire tankfuls of crude oil by force—rarely occurs; but sophisticated and premeditated theft by mismeasuring and fraudulently reporting the amount of oil purchased has been the practice for many years of the largest purchaser of Indian oil in the United States and others. The Department of the Interior and its relevant agencies, charged with stewardship of federal and Indian land, have knowingly allowed this widespread oil theft to go undetected for decades, at the direct expense of Indian owners.[3]

THE CASE OF KOCH OIL

Koch Oil ("Koch"), a subsidiary of Koch Industries and the largest purchaser of Indian oil in the country, is the most dramatic example of an oil company stealing by deliberate mismeasurement and fraudulent reporting.[4] Although Koch is also the largest independent purchaser of crude oil in the United States and Canada and the largest in Oklahoma, the company pilfered additional oil from American Indians and others.[5]

Koch's practice of sophisticated oil theft is carried out primarily by gaugers, the field personnel responsible for the measurement of crude oil. Gaugers are typically representatives of an oil company purchasing oil at a lease site. Their responsibility is to accurately measure the oil purchased from the producer and transported by truck or pipeline to the purchaser's facilities. Because there is usually no representative of the producer at the wells, purchasers measure oil under an "honor system." [6]

Gaugers must report the oil measured and purchased on documents called "run tickets." Oil measurement involves accurately measuring both the quantity and quality of the crude oil. The quantity is measured by gauging the depth of the oil in the producer's storage tanks adjacent to the wellhead prior to pumping ("top gauge"), the depth of the oil left in the tank after it is pumped out ("bottom gauge"), and the temperature of the oil to correct for expansion or contraction. The quality is determined by measuring the gravity and percentage of impurities in the oil ("Basic Sediment and Water" or BS&W). Koch gaugers were instructed to misstate each of these elements in the company's favor and fraudulently report their phony measurements on the run tickets.[7]

A purchaser's gauger who acquires more oil from a lease site than his company actually pays for is often said to be "long" or "over," while a gauger who takes less oil than his company bought is "short." If gaugers measure accurately, they should show little deviation, at most very slightly "short" or very slightly "over"—but never consistently "over." [8]

Internal Company Data

The Special Committee subpoenaed internal company data from more than 30 natural resource companies representing over 80 percent of all oil and gas production on Indian lands. Koch's data shows that during the last three years it was consistently "over" each year, acquiring $31 million more oil than it paid for, including more than $10 million in Oklahoma alone. The records further indicate that about one-quarter of Koch's 1988 profits in crude oil can be attributed to obtaining oil it did not pay for.[9] By contrast, the records of some of Koch's comparable competitors, including Phillips, Kerr-McGee, Conoco and Sun, demonstrate that they did not consistently acquire large amounts of crude oil they did not pay for.[10]

More important, rather than rely on internal data, the Special Committee mobilized its own surveillance team to observe Koch employees in action and independently monitor their oil measurements by covert "back-gauging." The FBI and Committee investigators also interviewed numerous supervisors and current and former employees of Koch, some under oath and others in tape-recorded confessions. Indeed, the Committee's own investigation indicates that Koch's figures, which already admit to more than $31 million in oil acquired by the company but not paid for in the past three years, are inaccurate and considerably understated, since they fail to fully reflect the theft admitted by Koch personnel on Indian lands.[11]

Surveillance by the Special Committee

FBI Special Agent James Elroy, along with Committee oil investigators and accountants, selected Indian leases throughout Oklahoma. Using livestock and trees for cover while hiding in ditches, Special Committee investigators staked out eight remote oil lease sites under covert surveillance. On each site, they also performed complete back-gaugings, or remeasurements, to check the oil purchaser's measurements. The same surveillance and back-gauging techniques, including extensive photographic and other documentation, were used on all the leases.[12]

The Special Committee found oil theft on six of the eight leases. Koch Oil was the purchaser on all six leases where theft occurred. Sun Oil and Vintage Oil were the purchasers at the two leases where oil was measured accurately.[13]

On an allottee lease in Caddo County, Oklahoma, for instance, Special Committee investigators determined that the Koch gauger was completely falsifying run tickets. Rather than actually measure the oil at the lease site, the gauger simply recorded false numbers in Koch's favor on his run tickets, for example, inflating the temperature by as much as 19 degrees.[14] On another Indian lease in Osage County, Oklahoma, Koch's gauger fraudulently reported increases in the oil's temperature by as much as ten degrees, while doubling the impurities in the oil. The four other surveillances of Koch personnel revealed similar fraud, allowing Koch to acquire more oil than it paid for.[15]

Interviews and Depositions of Current Koch Employees

FBI Agent Elroy and Special Committee investigators interviewed and deposed current Koch employees, who corroborated the widespread oil theft practiced on Indian and other lands. For example, the Caddo gauger, responsible for measuring 260 to 300 tanks monthly, acknowledged consistently inflating the measurement figures to ensure that he was never "short," *i.e.* delivering less oil than he bought. He stated that he falsified all his reports so that Koch would gain oil it did not purchase because his superiors at Koch continually pressured him never to be "short," while giving him a "book" which indicated what his gaugings should read. His calculations were never questioned by the company because he was always "long" by obtaining more oil through false reporting than Koch paid for.[16]

Other Koch gaugers involved in oil theft from Indian lands, unlike the Caddo gauger, actually did perform gauging; but none of them truthfully represented the amount of oil they purchased. When interviewed by Committee investigators, they confessed to intentionally falsifying all or portions of their run tickets. Some gaugers acknowledged that they had never even used their thermometers since Koch took over the company for which they previously worked, the Bigheart Oil Company.[17]

Indeed, Koch gaugers who worked for Bigheart before its 1987 takeover by Koch noted the marked contrast between the two companies. Bigheart had always stressed accuracy in oil measurement. If an employee were consistently either "long" or "short," he was subject to termination. To enforce accuracy, Bigheart even hired investigators and installed extra meters to spot check gaugers. The gaugers never knew when they were being watched, and, most important, the company put no pressure on them to be "long." Following the takeover, Koch removed Bigheart's meters used to recheck accuracy and instituted the "Koch method." The same gaugers who were caught stealing oil for Koch acknowledged that they began intentional mismeasuring only after Bigheart was taken over.[18]

Koch gaugers told Committee investigators that they received constant pressure from their superiors, during what Koch called "continuous improvement meetings," never to be "short." The gaugers were specifically instructed to engage in "volume enhancement," bumping the temperature about 10 degrees, taking anywhere from one to four inches of oil off the gauge, and increasing the sediment and water. [19]

One current Koch field supervisor even admitted to Committee investigators that he had been trained in the "Koch method" of gauging, *i.e.,* to "bump the bottom gauge" and "cut the top gauge" to take anywhere from half an inch to three or four inches of oil, depending on whether anyone was watching. If someone were observing him, the gauger was to be modest in his mismeasurement to avoid detection. If no one was watching, the gauger could use his discretion. Koch Service's Vice President for Operations testified that Koch engaged in an "aggressive approach to purchasing crude oil," and that any gauger who was regularly "short" would probably be taken off gauging and put "back into the maintenance crew," while any gauger who was regularly "long" would be left to continue. [20]

Former Koch Gaugers and Oil Producers

Former Koch gaugers throughout the country report remarkably similar stories. James Spalding, a Koch gauger in New Mexico from 1984 to 1988, testified that he was trained by the company to falsely increase the oil temperature, reduce the top gauge measurement, add to the bottom gauge, and increase the impurity level or BS&W. All of these "adjustments" served one purpose: to allow Koch to take oil without paying for it. When Spalding resisted and ceased practicing the "Koch method" of gauging, his supervisors pressured him to resume the theft. As far as Spalding knew, the "Koch method" was followed by all Koch gaugers. Accurate measurement would only occur when a pumper or operator was present to check the calculation. Company supervisors would falsely insist that their gaugers were "short" to keep the pressure on them to use the "Koch method." [21]

Numerous other Koch employees recount similar experiences. Donald Stark, employed by Koch Oil as a gauger from 1968 to 1985, was pressured to engage in "volume enhancement." When asked to summarize Koch's gauging policy, he said, "They damn sure were crooked." [22] Steve Chin, who had been one of Koch's top supervisors in North Dakota, stated that:

> The managers and we supervisors are hollered at so severely whenever there is a slightest shortage that they incorporate a permanent overage into their operation. All the gaugers run "long" because they are so afraid of the flack we'll receive if they are ever "short." [23]

According to Bill Kirtin of Tyler, Texas, a Koch superintendent who worked for the company from 1979 to 1986, run tickets were routinely falsified, including artificial increases in both temperature and sediment content, as well as misreporting the oil level in storage tanks.[24] Dennis Krocker, a Koch employee for six years, acknowledged the same gauging practices:

> When "long," there seems to be a feeling of jubilation among the gaugers and management personnel which encouraged gaugers to always be "long." Among all management personnel, Koch's gauging procedures were designed, in their opinion, as an extra revenue-producing tactic for Koch Oil.[25]

Indeed, statements from more than 50 ex-employees and corporate officers were remarkably similar, acknowledging a widespread corporate practice of oil theft by fraudulent mismeasuring and reporting.[26] In fact, a former member of Koch's Board of Directors told the Committee that he had raised questions with top Koch management as to why the company had large "overages" and failed to receive a valid explanation.[27]

The State of North Dakota has also found that in just three years Koch took more than $4 million worth of oil by mismeasurement in North Dakota alone. In addition, at least four producer oil companies have all caught Koch mismeasuring oil purchased from them.[28]

R.W. Rivas and Gene Poteet

Koch's corporate practice of oil theft is epitomized by the story of R. W. Rivas and Gene Poteet, two Koch gaugers. Poteet testified before the Committee that he was instructed by Koch supervisors to unilaterally adjust measurements, such as the gauges, temperature and sediment factor or BS&W, in the company's favor. Soon after Poteet began working for Koch, he learned that instructions in oil theft were commonplace at Koch and among other independent oil companies. Indeed, Poteet's nephew worked for another independent oil purchaser and was told that if he were unable to "steal his wages," he was not needed.[29]

After Poteet left Koch, he became a pumper for an oil producer in New Mexico, where he experienced first-hand, from the other side, the "Koch method" of measurement. Poteet was in an unusual situation. Most oil leases are isolated and lack the supervision that Poteet gave to those under his control. However, Poteet utilized an active system of "back-gauging." [30]

Poteet consistently found false measurements in the company's favor recorded on Koch run tickets and eventually caught R. W. Rivas, who had taken over Poteet's old job at Koch, repeatedly stealing oil for Koch. Poteet confronted Rivas, who thereafter stopped stealing from leases on Poteet's watch. Nevertheless, other producers subsequently caught Rivas and cancelled contracts with Koch. But Koch did not fire R. W. Rivas; instead the company moved him to Oklahoma, where he continued to fraudulently report oil purchased by Koch.[31]

Apache Corporation, a major oil and gas production company active on Indian lands, caught Koch gaugers, including Rivas, systematically stealing oil in Oklahoma. When confronted by Apache security officers, Rivas admitted that Koch supervisors had applied "a tremendous amount of pressure." As a result of analyzing only five of the many Apache wells from which Koch was purchasing oil, Apache submitted a claim for approximately $100,000 in lost revenue for one year alone, which Koch promptly paid.[32]

Rivas had caused Koch to lose contracts in New Mexico; he and another gauger cost the company $100,000 in claims in Oklahoma. But instead of being dismissed, he continued to work for Koch in Corpus Christi, Texas, still "measuring" oil.[33]

Koch's Response

Charles Koch, Chief Executive Officer and Chairman of the Board of Koch Industries, and other top Koch executives denied under oath before Committee investigators that the company was stealing by fraudulently reporting the amount of oil measured and purchased. While Charles Koch and other executives confirmed the company's own records indicating that Koch was taking more than $10 million a year of crude oil it did not pay for, Chairman Koch offered that:

> [Oil measurement] is a very uncertain art. . . . And you have people [measuring] who aren't rocket scientists. . . . [N]o one can ever make an exact measurement. . . . There is a lot of uncertainty . . . and you [have] got tremendous variations.[34]

Many comparable companies' records subpoenaed by the Committee, however, including Sun, Kerr-McGee, Phillips and Conoco, show no substantial "shortages" or "overages," and indicate that they did not acquire a significant amount of crude oil without paying for it.[35]

Although Koch officials were offered a further opportunity to testify under oath during public hearings, subject to cross-examination, they declined to do so. Instead, they issued a statement to the press which claimed that the Committee's investigation was fueled by Charles Koch's dissident brother William (and, by implication, was thereby somehow false) and that Koch was a minor player on Indian land, when in fact it is the largest purchaser of Indian oil in the United States.[36] After the hearings, Koch also attempted to look into the personal backgrounds of Committee staff. One Koch employee in Oklahoma even went so far as to interview the ex-wife of a Committee investigator about the circumstances of their divorce.[37]

The Committee has forwarded the case against Koch to the Department of Justice for criminal investigation.

THE OVERALL PROBLEM

Subpoenaed data and other testimony indicate that independent oil companies besides Koch may have engaged in a practice of oil theft on Indian land by fraudulent mismeasurement.[38] It is impossible, however, to quantify the amount of oil theft which has occurred. Clearly not limited to Koch alone, without question it is in the millions of dollars.[39] According to FBI Special Agent Elroy, the Committee's investigation demonstrates "that the theft is widespread and pervasive and [the Indians] are being horribly victimized. . . . The American Indian people are being grossly cheated out of a lot of money." As Special Agent Elroy further stated, "If we had six out of eight banks that we staked out being robbed, we would be extremely concerned that this is a pervasive problem." [40]

Theft is by no means limited to oil. Natural gas, in fact, is more easily stolen through fraudulent mismeasurement than crude oil. The Committee uncovered evidence to indicate that some companies were stealing natural gas by similar sophisticated mismeasurement techniques. Indeed, on the Southern Ute Indian Reservation, 76 percent of the gas meters independently tested for the Committee were calibrated to allow mismeasurement, whether by negligence or by theft. Moreover, internal data of one of the largest natural gas producers in the United States, with substantial Indian production, shows that in 1987, through mismeasurement, natural gas purchasers received at least $9.5 million worth of natural gas they never paid for.[41]

Most tellingly, the Special Committee's findings were the result of but a few months' work with limited manpower and resources. If the Special Committee could uncover, in a short time, such a widespread pattern of fraud affecting American Indians, why has the Department of the Interior, charged with the responsibility to protect Indian natural resources, failed to do likewise? The answer is a familiar one: American Indians again have placed their trust in federal entities, seemingly mobilized and watchful, but in reality dormant and impotent.

THE INADEQUACY OF FEDERAL PROTECTION AGAINST OIL THEFT

The Bureau of Land Management (BLM) of the Department of the Interior is the agency charged with being the "watchdog" to detect and prevent the theft of crude oil and natural gas from Indian land. This duty has been expressly delegated to BLM's Inspection Division, which employs full-time inspectors and other experts who are specifically tasked as one of their primary responsibilities with monitoring federal and Indian oil and gas leases to uncover and prevent theft. These inspectors, however, lack law enforcement authority and powers. Consequently, they must report all suspected incidents of theft to proper law enforcement authorities, such as the FBI.[42]

The BLM Inspection Division's Tulsa, Oklahoma regional office, with at least nine full-time inspectors covering Oklahoma, Kansas, and three-fourths of Texas, since 1981 has recorded only *nine* isolated thefts from Indian land, valued at a grand total of $20,490. The following chart represents the sum total of BLM's efforts:

BLM RECORDED OIL THEFT FOR OKLAHOMA INDIAN LAND[43]

Year	Date reported	Oil barrels	Value
1981	None	None	0
1982	None	None	0
1983	None	None	0
1984	July 24, 1984	72	$1,080
1984	Aug. 2, 1984	228	3,420
1984	Dec. 31, 1984	120	1,800
1985	Apr. 30, 1985	80	1,200
1985	May 30, 1985	160	2,400
1985	Oct. 8, 1985	180	2,700
1985	Oct. 28, 1985	175	2,625
1985	Oct. 28, 1985	196	2,940
1986	June 18, 1986	155	2,325
1987	None	None	0
1988	None	None	0
1989	None	None	0
Total		1,366	$20,490

At that, the BLM inspectors have detected *no* theft themselves, but merely have logged reports of theft called in by lease operators. Inspectors have relied totally on industry reports and have instituted no competent back-gauging or surveillance program, which would be capable of detecting sophisticated Koch-type theft involving fraudulent reporting. At the same time, BLM officials actually agreed with other expert witnesses before the Committee that the opportunity to steal crude oil from Indians by fraudulent mismeasurement and reporting is "wide open," a self-fulfilling prophecy given their complete lack of oversight.[44]

BLM officials even failed to report to appropriate law enforcement authorities the pitifully low incidence of theft they logged. Only in one or two instances did BLM simply telephone law enforcement officials, and still no report or file was forwarded, or any follow-up ever made.[45]

At the same time, six of the largest oil companies on Indian land testified under oath to the Committee that they initially reported possible oil theft to the BLM. However, after their first reports, the companies were never contacted by BLM to provide any details. BLM did not interview company officials or seek any documents. Once a theft report was made, it was dropped. Consequently, most companies simply stopped bothering to report theft to an agency that refused to even return their phone calls.[46]

In the face of such overwhelming proof of complete incompetence, the explanation offered by the responsible BLM supervisor was that he did not know oil company security personnel to learn of possible leads, nor could he contact the FBI to report possible violations.[47]

Robert Goodman, Director of BLM Oil and Gas Inspection for Eastern Oklahoma, testified that he failed to contact the FBI regarding oil theft because he "didn't have the proper telephone number." The sad truth is that the nine BLM inspectors in Oklahoma, according to their supervisor, spent 75 percent of their time in the office, not out in the field where theft could be detected. As the chart above indicates, the result is that at least nine full-time BLM inspectors annually recorded only $20,490 in oil theft from Indian lands in nine years. By contrast, the Special Committee uncovered millions in oil theft after only two months of investigation.[48]

Ironically, in December 1988, the BLM inspection force even received a specific report of possible oil theft by Koch Oil on Creek Indian land in Oklahoma. As of May 10, 1989, the date of the Special Committee's public hearing on BLM, no actual investigation of Koch had ever been conducted by BLM. In a model of bureaucratic double-speak, Goodman offered:

> It has been in a level II inspection status, and we are still dealing with that. It was going to be an interim production verification program, but now, since we know that we have problems with Koch, it will go into a full scale production verification.[49]

Five months after receipt of the complaint, BLM had absolutely nothing to show for its efforts, while it took the Special Committee but a few months to discover widespread oil theft by Koch and other companies.

Nonetheless, George Brown, BLM's Deputy Assistant Director in Washington, with overall charge of the entire inspection program on Indian lands, testified that BLM was fulfilling its responsibility to American Indians "appropriately and adequately." He further testified that Goodman, in particular, was fully meeting his responsibilities as an inspector when his office uncovered only $20,490 in oil theft from Indian lands in nine years.[50]

Chairman DeConcini even asked Brown if the failure to find the FBI's phone number to report theft was meeting BLM's responsibility, and Brown defiantly countered:

> I would tell you, Senator, that Mr. Goodman is meeting his responsibilities as an inspector. I'm sure that today he is aware of where to find the telephone number for the FBI, and I'm sure when he returns he will be able to contact them if necessary.[51]

Chairman DeConcini, holding up the Tulsa telephone book, responded:

> I'll show you where to find it. It's right there. You don't even have to look it up. It is on the front page.[52]

When questioned by Chairman DeConcini on the last day of Committee hearings, Secretary of the Interior Manuel Lujan Jr. pledged that BLM would follow the lead of Committee investigators in catching oil theft on Indian lands. "If your guys did better than ours did," testified Secretary Lujan, "you can be sure that ours will do better than yours." Apparently, the urgency of the Secretary's message was not understood by some BLM officials. During a meeting of the BIA/BLM/MMS Steering Committee in response to the Special Committee's hearings, a BLM representative expressed little concern about the theft of Indian oil by fraudulent measurement, saying that the "problem is more in terms of public relations. [BLM is] working with RMOGA [a trade association of oil companies, including Koch] on the issue. BLM will be asking industry to defend industry practice with no need for change." [53]

THE ROYALTY PAYMENT SYSTEM

INDIAN ROYALTIES: BREAKDOWN IN THE PAYMENT PROCESS

Apart from outright oil theft, Indians can be deprived of their full oil income by a breakdown in the royalty payment system itself. Royalties represent a share—typically ranging on Indian land from 12½ to 20 percent—of the value of total oil and gas production, free of production costs. Royalties may be paid by the actual producer of oil or gas, or by a purchaser, depending on the selling arrangement.[54]

The calculation and payment of royalties by oil and gas companies on Indian lands operates in much the same fashion as federal taxes. Companies, like taxpayers, calculate the royalty owed based on intricate federal laws and regulations they must interpret. Under this honor system, each month the companies submit their Indian royalty checks and accompanying data to the Interior Department's Minerals Management Service (MMS), the federal agency charged with the collection and accounting of federal and Indian royalties.[55]

When interpreting royalty calculations, company payments are usually made in good faith. However, like any honor system, including taxes, companies interpret royalty calculations in their self-interest and normally err on the side of underpayment. Moreover, unlike federal or private royalties, Indian royalties are governed by unique federal regulations and lease provisions designed to maximize Indian income. Because these requirements are highly complex, they not only pose an added burden on companies, but additional opportunities for favorable interpretation. Often companies simply fail to adjust their accounting procedures to reflect the unique nature of Indian royalties since they comprise such a small percentage of the literally millions of royalty accounting transactions handled by these companies each month.[56]

THE CAUSE OF ROYALTY UNDERPAYMENTS

Because the royalty calculation process is ultimately controlled by the companies paying royalties, the Special Committee placed under oath officials of the major oil and gas companies responsible for paying more than eighty percent of all Indian oil and gas royalties received by the federal government in the past six years. These companies operate and pay royalties on Indian leases owned by twenty-four Indian tribes, as well as allottees, located in more than eleven states. In addition to reviewing massive records and sworn responses relating to the internal accounting procedures, policies and business practices of the companies placed under oath, the Special Committee contacted tribes located on mineral-rich reservations for their input.[57]

From this information, the Special Committee has identified two primary causes of royalty underpayment by oil and gas companies active on Indian lands: improper valuation of crude oil and natural gas for royalty calculations, and improper deductions and allowances taken from the royalty base.[58]

Valuation of Oil and Gas

The Special Committee discovered that the companies' failure to perform majority pricing and other valuation requirements is a serious cause of Indian royalty underpayment. "Majority pricing" means that Indian lessees and payors, when calculating royalties, must value Indian oil and gas, at a minimum, equal to the value of a majority of like-quality production sold at arms length in the same field or area.[59]

In an attempt to maximize Indian royalties, the federal government has mandated majority pricing in the calculation of most Indian oil and gas royalties, while applying majority pricing more sparingly for federal royalties. Particularly when an Indian royalty payor is vertically integrated and transfers oil or gas to itself or one of its affiliated companies, competitive market forces do not come into play and the incentive to obtain the highest price is absent. Therefore, in non-arm's-length transactions, the royalty price or value could be depressed and majority pricing would significantly increase the value used to calculate Indian royalties.[60]

Companies responsible for paying more than one-fourth of all Indian oil and gas royalties testified to the Special Committee that, even when oil or gas is transferred within the company or sold to an affiliated company, they do not perform majority pricing. Other companies indicated that they do not perform majority pricing for natural gas royalties.[61]

From 1979 to 1983, Notice to Lessees Number Five ("NTL-5") required lessees, both Indian and federal, to value gas at the sales price or the ceiling prices established by the Natural Gas Policy Act (NGPA), whichever is higher. Since 1987, NTL-5 has mandated that all lessees use majority pricing when valuing natural gas produced on Indian lands.[62]

The Special Committee found that most companies it placed under oath have never complied with either the past or current NTL-5 requirements. Rather, they have computed and reported Indian royalties using sales proceeds as value, and have virtually never attempted to use majority pricing or NGPA ceiling prices in royalty calculations.[63] In addition to majority pricing, the Committee found that companies routinely failed to use other required accounting valuation methods, diminishing Indian royalty income.[64]

Deductions and Allowances From the Royalty Base

The other primary cause of underpayment of Indian royalties is the unauthorized or improper taking of deductions from the sales value of crude oil or natural gas. These deductions include: state and county production and property taxes; manufacturing/processing allowances on natural gas; transportation charges; compression and dehydration charges; and gathering, marketing and administrative charges.[65]

The Special Committee found that at least seven companies, responsible for approximately one-third of all Indian oil and gas royalties, have inappropriately deducted the costs of transporting a product from the lease site to a buyer. Companies responsible for more than half of all Indian oil and gas royalties have deducted state and county taxes from Indian royalties, despite a clear message from MMS that the deduction of such taxes from the royalty basis should be limited. Other payors of Indian royalties told the Special Committee that they may have inappropriately taken manufacturing and processing deductions. Indian tribes as well have identified the improper taking of deductions to be a major source of royalty underpayment, and have cited deductions which, when later audited, were found to be overstated by as much as 60 percent.[66]

Estimating the Value of Underpayments

Two federal agencies, MMS and its predecessor, collected approximately $600 million in Indian oil and gas royalties from 1978 through 1982. From 1983 through 1987, approximately $500 million was collected by MMS in Indian oil and gas royalties.[67]

Due primarily to the causes identified above, the Special Committee estimates that from 1978 through 1982 Indian oil and gas owners have been potentially underpaid between $25 and $60 million. From 1983 through 1987, they have been potentially underpaid between $10 million and $25 million.[68]

The decline in royalty underpayments is not simply a result of refined federal oversight. Prior to 1982 the potential for underpayments was at its greatest, as our nation witnessed the highest oil and gas prices in its history, no government agency was proficient in royalty accounting, and interpretations of proper royalty valuation were almost exclusively left to the companies. Furthermore, very few tribes had developed any mineral accounting expertise.[69]

After 1982 the price of oil and gas fell, causing a corresponding decline in the value of royalties. In addition, the creation of MMS represented the federal government's first serious effort to oversee royalties, and the Federal Oil and Gas Royalty Management Act (FOGRMA), related federal regulations, and litigation resolved some controversial, large-dollar royalty issues. Finally, during this period many Indian tribes with energy resources established expertise to monitor their royalties. Moreover, with the advent of tribal severance taxes, tribes for the first time began to have access to information relating to production on their leases. Given the current oil and gas market conditions, increased accountability afforded by systems improvements at MMS, and the tribes' more direct and active role in oversight, the potential for royalty underpayments has decreased.[70]

THE ROLE OF THE MINERALS MANAGEMENT SERVICE

In 1982 MMS was created in response to concerns that the federal government's collection and accounting of Indian and federal royalties were disorganized and ineffective. MMS has performed commendably in assuming the royalty accounting and auditing functions all but ignored by its predecessor, the United States Geological Survey. MMS has established both a computer royalty accounting system that catches major reporting errors and an organizational department devoted exclusively to auditing companies responsible for Indian and federal royalties. After years of refining its accounting and auditing functions, MMS today successfully collects and accounts for all but a small percentage of the Indian royalties which it is responsible for overseeing.[71]

MMS, however, allocates its limited resources to cover as many royalty dollars as possible, and Indian underpayments comprise less than a fraction of one percent of all monies collected by MMS. Therefore, while in general MMS has operated with increasing professionalism and effectiveness, for Indian royalty owners MMS has not prioritized either collecting this underpayment or eliminating the causes of Indian underpayment described earlier in this chapter.[72]

Since royalty underpayment often results from a defensible interpretation of complex rules, oil and gas companies usually take the same approach as most taxpayers: where there is doubt, they interpret the rules to their own advantage, guarding against overpayment. However, two congressional committees and a Presidential commission all concluded during the past seven years that royalty underpayments were more common than underpayment of taxes because "[p]enalties for underpayment of royalties scarcely exist."[73]

Today, MMS still has never collected any penalties involving Indian leases. Only one company has ever received as much as a notice of noncompliance relating to an Indian lease. Even in the area of federal royalties, MMS has collected only a trivial $74,000 in penalties since 1983, although its annual federal and Indian royalties and revenues exceed $4 billion.[74]

While failing to impose penalties, the MMS accounting system by itself has failed to ensure that companies calculate royalties using appropriate valuation methods such as majority pricing and NTL-5 analysis, and that companies do not take improper deductions. Instead, MMS relies on auditing as its primary means to enforce compliance with regulations and guarantee that Indian royalties are maximized.

MMS, however, has audited less than one-third of all Indian leases held by companies responsible for about eighty percent of Indian oil and gas royalties.[75] Moreover, MMS does not use its accounting system to flag for audit those companies that may be failing to follow procedures and regulations enacted to maximize the return of the Indian royalty owner. Not until 1985, in response to congressional hearings, did MMS even set aside a portion of its resources to audit Indian leases exclusively, and only in 1988 did MMS formally adopt a "comprehensive" audit strategy that emphasized Indian leases. In fact, the Interior Department's Inspector General recently found that MMS was spending more than a third of its audit resources on verifying industry refund claims, rather than verifying the accuracy of royalty payments.[76]

The problem at MMS is not institutional incompetence as at BIA, or direct antagonism towards Indian interests as demonstrated by the callousness of BLM, but lack of a clear direction and mandate concerning Indians. For years, companies paying Indian royalties have been neither adequately audited by MMS nor sufficiently penalized when they fail to specially account for, and properly pay, Indian royalties. The problem is that Indian royalties comprise such a small part of MMS jurisdiction that they simply fail to be a priority, in part because Congress has not instructed the agency how much resources it should devote to Indian royalties. While MMS has made considerable progress in collecting and accounting for all royalties, the Indian royalty still does not receive the attention to which it is entitled.[77]

TRIBAL EFFORTS TO COLLECT ROYALTIES [78]

Tribes recognize that no federal agency or private corporation can appreciate their royalty interests better than themselves. Although Indian royalties comprise a small portion of MMS collections, they furnish much-needed revenues to fund tribal agencies and provide basic services to Indian families.[79]

The Southern Ute Tribe has long realized the importance of the marketable oil, gas and coal that lay under its reservation lands. With the formation of a tribal Energy Resource Division in 1980, the Southern Utes began to successfully assess their mineral assets. Armed with this knowledge, the tribe has entered into profitable deals with outside companies interested in extracting and marketing natural gas, oil and coal.[80]

The tribe has impressed industry and earned the respect of companies seeking to extract minerals from the Southern Ute Reservation. The Southern Ute Energy Resource Division contains a formidable array of professionals, including in-house geologists and a mineral accountant. Through the efforts of these tribal employees, the Southern Utes have identified underpayments of royalties owed to the tribe. For example, the tribe discovered in late 1988 that an operator on Southern Ute land was failing to report actual production of natural gas to MMS, thereby withholding rightful royalties from the tribe.[81]

In response to increased mineral activity on their reservation, the Wind River tribes have also developed admirable expertise. For example, the tribes have installed a sophisticated computer system to evaluate production, sales, and valuation data from the tribes' 105 leases. In 1986 alone, this system identified approximately $300,000 in underpayment of royalties. Tribal representatives testified that these underpayments stem primarily from improper valuation of extracted resources, such as the failure of companies to perform majority pricing.[82]

Tribes have begun limited monitoring of royalties primarily as a result of implementing severance taxes on natural resources extracted from their lands. Because MMS and company lessees until recently had complete control of all information relating to royalty payments, tribes never had access to data crucial to the calculation of royalty payments. With the advent of tribal severance taxes, the tribes now for the first time have the authority to demand that operators submit all information regarding taxes on a timely basis. Tribes can thus analyze this information to determine whether companies may be underpaying their royalties.[83]

Despite the success of tribes in monitoring their own royalties, their efforts in this area have been hindered. Because MMS has sole authority to account for Indian royalty payments, perform audits on Indian leases, and enforce determinations of underpayments, tribes are not free to identify underpayments and enforce collection.[84]

The Southern Utes, for example, could not impose penalties or interest on one operator's blatant withholding of royalties over a three year period and still wait for the Department of the Interior to take action. When a major oil and gas company was found to be flaring natural gas without authorization on the Wind River Reservation, the tribes had to wait for MMS to demand and collect unpaid royalties. In 1988, almost two years after the flaring was discovered, MMS finally sent a letter to the company demanding unpaid royalties.[85]

Tribes rarely receive federal funds to perform their own monitoring of royalties. Although federal law allows MMS to allocate resources to tribes for the purpose of auditing tribal leases, MMS has not been implementing this authority.[86] Since the creation of MMS, only two tribes, the Navajo Nation and the Ute Tribe of Utah, have entered into agreements with MMS whereby funds are distributed to the tribes. Only two other tribes, the Southern Utes and the Jicarilla Apache, have obtained agreements where MMS provides staff resources, rather than money, to the tribes. Some smaller mineral-producing tribes do not even know that these MMS agreements are available.[87]

For the few tribes involved with such agreements, MMS continues to retain enforcement control and ultimately determine which leases will be audited. In implementing its agreement for the first time, the Ute Tribe of Utah recommended that MMS audit twenty-two leases held by a major oil and gas company on their reservation. For various reasons, MMS decided to audit only three leases.[88]

When underpayments are identified through audit, delay and lengthy appeals are common. In two audits performed by MMS and the Southern Ute tribe pursuant to an agreement, almost $600,000 in underpayments have been identified, but the tribe has waited over two years for MMS to resolve appeals and enforce the audit findings.[89]

Indian tribes have also faced difficulties in their efforts to regulate natural resource production on their own lands. The Supreme Court's recent decision in *Cotton Petroleum* v. *New Mexico,* interpreting federal statutes, allows state and local governments, in addition to Indian tribes, to impose severance taxes on companies producing natural resources on Indian lands. *Cotton Petroleum* actually rejects the proposition that Indian oil and gas income should be maximized whenever possible, and permits triple taxation, which can total as high as 25 to 30 percent, to be imposed upon Indian lessees.[90] In the presently depressed market for oil and gas, energy production companies have indicated that this tax burden alone could cause them to bypass Indian country.[91]

THE INDIVIDUAL INDIAN OIL AND GAS ALLOTTEES

Individual Indian allottee owners of oil and gas throughout the country receive royalties on a regular basis. These allottees own tracts of land which were allotted for private Indian ownership by the federal government in the 19th or early 20th century. These lands usually descend through generations by inheritance, and are within the legal protection of the federal government as long as they remain Indian-owned.[92]

Indian allottees face even greater difficulties than tribes in understanding how oil and gas companies have calculated their royalties. Allottees not only lack the governmental resources of tribes, but have continued to be neglected by BIA and MMS, the two agencies they must rely on for the proper collection and protection of their royalties.[93]

The BIA's Explanation of Payment Form

The BIA's neglect of allottees is epitomized by the "Explanation of Payment" forms which accompany the royalty checks of all allottees. These forms, created and distributed by BIA, provide allottees with information on oil and gas production and royalty calculation.[94]

The BIA has completely bungled Congress' goal, announced almost seven years ago, to provide allottees with clear and adequate information regarding their royalty receipts. In early 1983, alarmed at the federal government's poor handling of Indian and federal royalties, Congress passed the Federal Oil and Gas Royalty Management Act (FOGRMA). At that time, royalties to Indian landowners were frequently late, reduced or suspended, and unaccompanied by any coherent explanation, often with serious consequences for impoverished allottees. Congress' requirement that BIA design and distribute an understandable Explanation of Payment form was hardly a complicated or onerous assignment, since industry had been providing private royalty owners with clear and concise explanations for decades. Ironically, private landowners adjacent to Indian lands received a comprehensible Explanation of Payment from industry, while their Indian neighbors next door, after industry submitted its data to the federal government, did not.[95]

BIA's problems with the Explanation of Payment forms continued even after FOGRMA was enacted. In 1985, two years after the passage of FOGRMA, allottees were still not receiving any explanation of their royalties. A House subcommittee also warned the BIA that its intended design for the form would not provide the minimum information needed for allottees to understand how their royalty dollars were calculated. In 1986 the General Accounting Office again noted that BIA had not yet sent Explanation of Payment forms to all allottees, and that the information contained in the form was difficult to comprehend and did not provide royalty rates, as required by statute.[96]

Today, the Explanation of Payment form continues to be the source of much confusion, not only to allottees but even to BIA employees themselves. Royalty rates and other crucial information are "rolled up" into averages that sometimes lead to negative rates and incomprehensible numbers being printed on the form. Companies routinely take deductions and allowances that decrease royalties but are not explained on the form. The Committee found that allottees still cannot comprehend the Explanation of Payment forms and BIA employees often cannot explain them. In fact, even the Director of MMS admitted to the Committee that he cannot understand the information printed on the current form, and believes that it could be improved.[97]

As in 1982, these unintelligible forms can have tragic consequences for allottees. Mary Limpy, a Cheyenne-

Arapaho Indian from Oklahoma, is an allottee owner of land containing crude oil. Physically unable to work, she depends on royalty checks to feed and clothe herself and her three children. But when Mary Limpy's royalty checks suddenly stopped coming, her Explanation of Payment forms were still indicating royalty ownership and payment entitlement. She therefore could not qualify for Oklahoma state welfare. And the BIA could not give her a reason why her royalty checks stopped—or even a form that indicated zero royalties so she could receive state welfare. Unable to pay rent or support her children, Limpy was forced to live in an abandoned house and put her children up for adoption. Mary Limpy also had to file suit in federal court to gain what the government should have provided in the first place, and sadly has still not received relief.[98]

In early 1988 the royalty payments from Yvonne and Richard Curry's Utah lease plummeted almost 90 percent. The Currys were determined to discover why the decline in their royalties was far greater than the corresponding decline in oil prices. Unfortunately, the Currys, like all allottees, must rely on the Explanation of Payment form to answer questions about the proper calculation of their royalty checks. To the Currys the form was a mix of garbled numbers that meant nothing. They approached various BIA officials for assistance, but none of them could understand the numbers on their own form.[99]

Houston and Velma Decker, members of the Caddo Tribe of Oklahoma, are a retired couple who receive most of their income from an inherited allotment of land producing natural gas. In March of 1988 the Deckers received an unusually low check of $199. Their curiosity led them to analyze the Explanation of Payment form provided by BIA each month with their royalty check. In the words of Mrs. Decker, the form was "a bunch of jumble."[100]

The Deckers could not tell from reading the form whether the proper lease royalty rate was being applied. In fact, the reported gas prices were suspicious. One well on their property located less than two miles from another well was receiving 16 percent more for the same product. The forms contained negative figures and gave no explanation for large allowances apparently deducted.[101]

Allottees and the Unresponsive Federal Bureaucracy

When allottees like the Deckers, the Currys and Mary Limpy suspect a problem with their leases, they must turn to the BIA or MMS for answers. At times, these agencies have simply ignored requests. At other times, they have refused to furnish basic information, even though it related to contracts to which the allottees are parties.[102]

After the Deckers realized that their royalty payments were unusually low, they sent a letter to the BIA's Anadarko Area Office requesting assistance. The letter was never answered, and five days later, the Deckers received a mysterious royalty check from the BIA without any explanation. The Deckers then phoned the BIA office to inquire about their payments and were told that the Realty Officer would get back to them. He never did.[103]

After seven months of attempting to contact BIA with no response, the Deckers drove 250 miles to the BIA Area Office to learn what was happening. During the Deckers' visit, the Oil and Gas Realty Officer and the Chief Realty Officer of the BIA Area Office both told the Deckers that BIA could not answer the Deckers' questions regarding their Explanation of Payment forms. They suggested that the Deckers contact MMS in Colorado—without even providing the Deckers an address or phone number.[104]

Ervin Chavez is the Navajo owner of allotted land in New Mexico and knows firsthand the federal government's failure to respond to allottees. He and other Navajo allottees repeatedly contacted the BIA and MMS to determine why their royalty payments were anywhere from six months to over a year late, why the information provided was slim, and why they were not receiving any interest on their late royalty checks. Members of Chavez' group often travelled hundreds of miles to BIA offices, only to be told that BIA could not give them any clear answers. It took a lengthy lawsuit, continuing for almost five years, for Chavez and other Navajo allottees to finally force BIA to address their concerns and provide them the assistance they should have received when the problems first occurred.[105]

If allottees like Chavez need assistance from BIA, they are directed to realty officers who are usually unaware of oil and gas industry practices and procedures. When approaching MMS, allottees find an organization more professional than BIA, but nonetheless ill-equipped to meet allottee needs.[106]

The Office of External Affairs, the only MMS office dealing directly with allottees, employs three people who merely provide desk reviews of leases when BIA is unable to resolve allottee concerns. Currently, due to limited resources, the office is handling almost exclusively allottees' problems from Oklahoma, and is unable to provide comparable attention to allottees in other states. Given the lack of resources allocated to its Office of External Affairs, MMS concedes that it may not be meeting its responsibilities to Indian allottees.[107]

Allottees rely totally on the federal government to collect, account for and distribute royalties properly. Many allottees, like Mary Limpy, live in poverty and collect less than $3,000 annually in royalties. Ten or twenty dollars unaccounted for by MMS or BIA among billions of federal royalties may seem insignificant, but to some allottees, every dollar is critical income.[108]

OTHER FAILURES OF THE DEPARTMENT OF THE INTERIOR

THE ARKANSAS RIVERBED

In 1970 the U.S. Supreme Court held that the Cherokee, Choctaw and Chickasaw Nations, three of the four largest Indian tribes in Oklahoma, owned title to ninety-six miles of Arkansas Riverbed lands in eastern Oklahoma. Unfortunately, at the time of the decision, the Riverbed lands were already occupied by hundreds of private landowners who were, in effect, trespassers. The tribes themselves were then, and are now, powerless to evict the trespassers because by statute all eviction actions on Indian lands must be substantiated by surveys conducted and certified by the Bureau of Land Management. Without the BLM surveys, the tribes are barred from court. BLM, however, will only survey the Riverbed land if it receives a request from BIA. The ultimate responsibility for initiating surveys of the Riverbed thus resides with BIA.[109]

Even though BIA has been charged with this specific responsibility since 1970, in 19 years it has obtained surveys of only 789 of the 22,000 Riverbed acres. The BIA's minimal efforts to initiate surveys and reclaim the Arkansas Riverbed have cost the Cherokee, Choctaw and Chickasaw Nations more than $5 million a year.[110]

The delay began when the Supreme Court held that the three tribes had treaty rights to the Riverbed. The 1970 Supreme Court decision corrected an erroneous opinion issued by the Department of the Interior in 1908 that concluded the Riverbed had been conveyed to Oklahoma when it became a state in 1907. Because of Interior's error, for 62 years the land was mistakenly assumed to be non-tribal land. By the time the Supreme Court corrected the erroneous opinion, the Riverbed land had been conveyed and reconveyed numerous times to private Indian and non-Indian landowners, companies and governmental entities.[111]

In 1989, nineteen years after the Supreme Court decision, virtually none of the lands have been returned to the tribes. When asked to explain BIA's delay in obtaining surveys, a BIA official stated that the agency's attention was diverted to less significant problems elsewhere because "squeaky wheels got the oil." Merritt Youngdeer, the BIA's Area Director for Eastern Oklahoma, candidly acknowledged to Committee investigators that the BIA has failed in its basic responsibilities to survey the Riverbed lands and return them to the tribes.[112]

BIA's impotence in obtaining surveys is well known along the Riverbed. One typical lease negotiation between a trespasser and a non-Indian lessee was proceeding smoothly until the lessee heard that the Cherokee tribe might own the land. Disturbed to hear this news, the lessee then asked who would make a claim on behalf of the tribe. When the lessee heard that it was the BIA, he breathed a sigh of relief and stated, "By the time they get around to it, I'll probably be dead anyway"[113]

BIA's failure to reclaim the Riverbed has allowed the trespassers to remain. One defiant trespasser keeps a weed-infested auto salvage yard on Riverbed land that has potential for lucrative economic development. Instead, four hundred rusty junk cars are sprawled across twenty acres, even though the trespasser's deed describes his tract as covering only "two acres more or less." When surveyors finally tried to survey the salvage yard in the summer of 1988, the trespasser waived his shotgun at them. The property was only surveyed after they returned with armed federal marshals. Although the land has now been surveyed, the trespasser is still on the land and angrily maintains that he is going to remain, through force if necessary.[114]

The Riverbed traverses one of the most productive natural gas areas in Oklahoma, and BIA's failure to conduct surveys has cost the tribes significant oil and gas royalties. In the late 1970's, the Department of the Interior estimated the total market value of the subsurface oil and gas reserves under the Riverbed at forty million dollars. Since the assessment, substantial additional gas reserves have been discovered. Yet these valuable reserves have been exploited by trespassers to the detriment of the tribes.[115]

The presence of unauthorized trespassers on the Riverbed has also discouraged and prevented legitimate oil and gas exploration. When the Stephens Production Company entered into a lease of Riverbed land with the Cherokee Nation that was approved by the Department of the Interior, the company believed there would be little problem in moving their expensive drilling rigs onto their lease. Stephens was shocked, however, when it discovered that trespassing parties occupied the leasehold. These trespassers plowed up the stakes the company had placed around their planned drilling areas. Stephens was further dismayed when the BIA took no steps to reclaim the property and instead cited a need for surveys. BIA's failure to secure the property has prevented Stephens from drilling and the Cherokees have lost substantial natural gas royalties.[116]

The three tribes are also losing revenues from sand and gravel sales. There is a large demand for sand and gravel along the Arkansas Riverbed, but the tribes are not able to take advantage of the market without their ownership being substantiated by a survey. The Army Corps of Engineers is a major purchaser of sand and gravel and pays many leaseholders for these resources, even though they are often trespassers. The estimated total market value of the sand and gravel on the Arkansas Riverbed is $32 million, but the tribes have gained only a minute fraction due to BIA's negligence in obtaining surveys.[117]

The three tribes also have lost agricultural lease and crop revenues. Although the Riverbed land contains fifteen thousand acres of fertile soil on which soybeans, hay, alfalfa and barley are grown, the tribes are precluded from enjoying the economic benefits of these crops because the lands are farmed by non-tribal entities. One farmer even tried to sell the Cherokees its own alfalfa, which the tribe refused. But it cannot evict the trespassing farmer until the surveys are completed. Since 1970 the tribes have been deprived of at least one million dollars a year in lost agricultural lease revenues.[118]

SAC AND FOX WATER CONTAMINATION

During the last thirty years, the BIA has allowed oil companies to inject 63 million barrels of saltwater into oil reservoirs located on 800 acres of Sac and Fox tribal lands in central Oklahoma, in order to force the oil into producing wells. While secondary injection recovery is a standard method of oil production, it is wholly improper to inject waters into oil reservoirs that may migrate into drinking water supplies.[119]

The BIA allowed such improper practices on the Sac and Fox lands which created a "leaking bucket" phenomenon when contaminated salt water migrated into the tribe's freshwater aquifers and abandoned wells. Eventually, nearly all of the tribe's freshwater sources were irreparably destroyed.[120]

With virtually all of their freshwater contaminated, the tribe was left with only one remedy—a lawsuit for damages. The Sac and Fox is a small tribe, however, with severely limited resources to pay for the attorneys, water hydrologists, seismic engineers and other experts necessary to prepare and litigate a lawsuit against well-financed oil companies. Unable to fund its own lawsuit, in 1977 the Sac and Fox Tribal Council enacted a resolution asking that BIA file a lawsuit for damages. Adding insult to injury, however, the BIA has never filed a lawsuit.[121]

The maddening process by which BIA began to study a possible suit for damages began in 1979 with the first study of the water contamination. In 1982 an updated version of the first study was completed, and in 1984 the contamination was studied again. In 1989 BIA ordered a study of all the previous studies which recommended yet another study. Throughout this twelve-year period, no litigation against the oil companies responsible for the contamination has been filed and the tribe is no closer to receiving damages than it was in 1977.[122]

Compounding this delay, in 1984 the BIA's files on the contamination matter, which were located in the Interior Department's Field Solicitor Office in Anadarko, Oklahoma, were boxed up and transferred to the Regional Solicitor's Office in Tulsa, Oklahoma. These boxes were "lost" until early 1988, when they were finally discovered. Thus, for four years the Department of the Interior's proposed litigation literally sat on a shelf. When Joe Walker, the Assistant Area Director of the Anadarko office was asked whether he was outraged over the twelve-year delay in bringing the Sac and Fox litigation, he replied, "I'm a little upset. Yes, sir. But I know that complicated things take a long time." [123]

Walker's apathy over the contamination can be contrasted with the concern of the Sac and Fox people. As Truman Carter, the Secretary of the Nation, noted, "It is a difference in value judgment. The Bureau of Indian Affairs officials don't have to live there on those lands. . . . It is kind of out of sight, out of mind, out of touch." While contemplating the sorry record of BIA's mismanagement, Carter added, "We can't stand much more BIA protection." In fact, the tribe is losing economic opportunities. When the tribe entered into a $30 million contract in 1989 to make chemical protective gear for the Department of Defense, the tribe had to find a plant 150 miles away from tribal lands because they could not offer clean water.[124]

LITIGATION DELAYS BY THE OFFICE OF THE SOLICITOR

BIA's failure to protect the natural resources of the Cherokee, Chickasaw, Choctaw and Sac and Fox Tribes has been compounded by marginal legal representation from the Department of the Interior. The Department's Office of the Solicitor and its Southwest Regional Office provide legal advice to the BIA and recommend litigation to the Department of Justice on behalf of Indian tribes. Not only did the Southwest Regional office leave boxes of Sac and Fox litigation files literally untouched for four years, they also failed for 19 years to file a lawsuit to evict private trespassers from the Arkansas Riverbed.

The failure to initiate timely litigation to protect Indian natural resources is not, however, limited to the

Southwest Region. The headquarters Office of the Solicitor in Washington, D.C. received seventeen litigation requests from Indian tribes between December 1985 and April 1989. Yet the Solicitor's Office—the designated legal advocate for Indian interests—only intervened on behalf of tribes in three ongoing cases. The Solicitor even declined a tribal request to intervene when the tribe had prevailed in the lower federal courts and, in another case, where the tribe ultimately prevailed in the U.S. Supreme Court.[125]

The Solicitor's Office also failed to respond in a timely manner to tribal requests for litigation to protect natural resources. For example, the Mille Lacs Band of Chippewas in Minnesota first requested the Solicitor's assistance in April of 1984 to pursue its natural resource treaty rights to land containing valuable wild rice, fishing and wildlife. The Band repeatedly pursued its request to the Solicitor's Office without success. In 1988 the Band resubmitted another litigation request after it was told that its previous request may have been "lost." On July 14, 1988, Mille Lacs representatives met with Assistant Secretary Ross Swimmer, Solicitor Ralph Tarr, and Associate Solicitor Dennis Daugherty and were assured that the report would be filed with the Department of Justice by August 30, 1988. The Solicitor's Office missed its deadline and the Department of the Interior did not finally file its litigation report with the Department of Justice until March 1989 after an inquiry from the Special Committee.[126]

As in the Mille Lacs matter, the response of the Solicitor's Office to two litigation requests received from the Assiniboine and Sioux Tribes on the Fort Peck Reservation in Montana also was grossly inadequate. The Assiniboine and Sioux Tribes made their first request in 1987, after Solicitor Ralph Tarr had informed their attorney, Reid Chambers, that no tribes were requesting the Department of the Interior's assistance. Chambers asked Solicitor Tarr to bring the two Sioux cases and later personally hand-delivered one of his litigation requests to the Solicitor. Fourteen months later, Chambers still had not received a response from the Solicitor's Office. Again, after a January 1989, Special Committee hearing, the Solicitor finally asked the Department of Justice to file an *amicus* brief in one of the Sioux cases. By that time, however, the Sioux had already prevailed in U.S. District Court without the assistance of the Solicitor. On the second case, the Solicitor's Office sent no reply to Chambers for almost a year. By the time the Department of the Interior responded, the case had been favorably settled by the tribe. Associate Solicitor Daugherty later explained to Committee investigators that Chambers' letters had been "misplaced" for six months.[127]

URANIUM WASTE AT THE SPOKANE RESERVATION

On the Spokane Indian Reservation in Washington State, BIA for years has refused to address a potentially dangerous environmental problem. The Dawn Uranium Mine on the Spokane Reservation began operation in 1955 and since that time has produced almost six million tons of low-grade uranium ore and thirty-three million tons of uranium waste. The waste is piled in dumps around wastewater pits which contain almost 150 million gallons of wastewater. The Dawn Mine is now closed, but the waste remains. BIA has taken virtually no steps to clean up this wastewater, and has taken no action against the Dawn Mining Company, which has refused BIA's order to increase its reclamation bond from a wholly inadequate $15,000 to $9.7 million.[128]

Because of BIA's unwillingness to clean up the waste or force Dawn to pay for the cleanup, uranium wastewater continuously seeps out of storage pits and flows until it is captured in tanks and pumped back into the pits. Before 1986, when the Environmental Protection Agency finally required Dawn to capture the seepage, approximately 34 million gallons per year of contaminated water flowed from the mine site into spring-fed streams, including Blue Creek, a reservation fishing stream. The wastewater has virtually destroyed Blue Creek's rainbow trout.[129]

At the same time, BIA has only slowly taken steps to require the company to increase its bond. When in 1982 the Assistant Secretary for Indian Affairs ordered Dawn Mining Company to furnish a reclamation bond in the amount of $6.8 million, the mining company sued successfully on its claim that it had been denied procedural due process. After giving Dawn the opportunity to comment on the proposed reclamation bond, the Assistant Secretary for Indian Affairs issued an order in 1987 requiring Dawn to post a new bond in the amount of $9.7

million. Dawn claims it is unable to furnish the bond and refuses to comply with the order.[130]

BIA's order was toothless, however, since Dawn Mine has faced no adverse consequences for failing to provide the bond. Dawn's lease has not been cancelled and, until recently, BIA did not require the mining company to take any steps to treat the contaminated water.[131]

HOPI WATER QUALITY PROBLEMS

BIA's coordination with other federal governmental agencies even within the Department of the Interior also has been insufficient. Interior's Office of Surface Mining (OSM) is required by federal regulations to consult with BIA on permit applications and revisions for surface mining operations on Indian lands. However, such consultation is often meaningless, as illustrated by the Peabody Coal Company's permit for the Black Mesa-Kayenta Mine on the Navajo and Hopi reservations.[132]

In 1984, Peabody filed an application to continue its mining at the Black Mesa Mine and OSM consulted BIA, as it was required to do. BIA was to determine whether the permit renewal would cause the Hopi and Navajo tribes any adverse water quality problems. Instead, BIA performed no hydrologic analyses of the proposed coal mining slurry ponds at the mine and provided only minimal comments on the application.[133]

The Hopi Tribe later contracted with a hydrologist to obtain its own analysis of the slurry ponds, and determined the ponds would create significant water quality problems in the Moenkopi Wash, a watershed area near the mines. The Tribe's study harshly criticized the findings of OSM's hydrologists that there were no significant impacts on Hopi water sources.[134]

While the Hopi Tribe actively tried to protect its water supplies, the BIA, in complete contravention of its legal obligations, provided almost no assistance to the tribe. Today, the Hopi Tribe and OSM continue to dispute the hydrologic impacts on the proposed mining areas, as BIA sits on the sidelines.[135]

WATER MANAGEMENT

The Wind River Reservation in Wyoming is home to the Shoshone and Arapaho Tribes and includes some of the highest quality fish habitats in the United States.

The 2.2 million-acre reservation contains 1,100 miles of rivers and streams, with rainbow trout, brown trout and ling fish. The mismanagement of these water resources by the Bureau of Reclamation, however, has damaged the fisheries, costing the tribes thousands of dollars in lost revenues.[136]

The Bureau of Reclamation of the Department of the Interior has contributed to water quality problems at Wind River by improper sluicing operations. Sluicing occurs when dams are opened up to allow silt and sediment build-up to wash downstream. Frequent and uncontrolled sluicing can lead to the destruction of fish habitats because the silt covers the food sources of fish and fish eggs. The Bureau of Reclamation's sluicing at one reservation dam resulted in habitat damage and led to harmful turbidity problems that have killed thousands of fish.[137]

The Bureau of Reclamation's improper fluctuation of water levels at the Bull Lake Reservoir and Bull Lake Creek also caused damage to the tribes' fisheries. By dramatically fluctuating the water levels at Bull Lake and Bull Lake Creek, the Bureau of Reclamation has severely reduced the trout population and eliminated trout spawning areas, forcing the Shoshone and Arapaho Tribes to cancel their 1988-89 winter fishing season and costing the tribes thousands of dollars in lost fishing license revenues.[138]

The U.S. Fish and Wildlife Service and the Shoshone and Arapaho Tribes have severely criticized the Bureau of Reclamation's water management at Wind River, but their objections often have been ignored. Bureau of Reclamation officials concede that they have failed to protect the fishery resources at Wind River. They explain that their traditional approach was to favor providing water to non-Indian irrigators over tribal fisheries protection. While providing irrigation water is the primary goal of the Bureau of Reclamation, Bureau of Reclamation officials now acknowledge that in many cases better management could accomplish both goals.[139]

The mismanagement of dams on Indian lands is not limited to the Bureau of Reclamation. The Inspector General recently found that at least 31 of 54 dams managed by BIA pose a serious threat to hundreds of lives and surrounding property, which could potentially cost more than a hundred million dollars to repair. Inadequate maintenance by the BIA has left these dams, all located on Indian lands in the West, in "poor" or "unsatisfactory" condition. Despite the Bureau of Reclamation's warnings to BIA to remedy the dangerous problems, BIA has failed to repair the dams.[140]

Indeed, the Inspector General has found that most of these dams could not withstand a major flood and are imminent threats to rural communities downstream. Among the worst examples are the Ganado, Round Rock, and Many Farms dams in Arizona, the Pablo and Lower Dry Forks dams in Montana, and the Ponca Dam in South Dakota. Typical of BIA's response to the identification of a crisis, it not only refused to address the Bureau of Reclamation warnings, but waited four-and-a-half months to respond to the Inspector General.[141]

TIMBER MANAGEMENT

BIA's management of Indian timber resources has also proved inadequate. Although timber is potentially a major source of income for several dozen reservations, especially in the Northwest, the BIA's own internal assessments indicate serious deficiencies in its Division of Forestry. While asserting that inadequate funding is the cause of BIA's problems, the Chief of that Division acknowledges that tribes have lost more than $330 million in the last decade alone from the poor management of their forests and woodlands.[142]

This estimate may, however, be significantly understated since BIA foresters still rely on outdated "paper-and-pencil" calculations to determine their harvest, rather than the advanced computer programs used by the U.S. Forest Service. Data processing is only one of several fields in which BIA has fallen behind current developments in the increasingly sophisticated field of forestry. A severe shortage of personnel with specialized skills in the areas of forest engineering, soils and hydrology also limits BIA's ability to maximize timber harvests.[143]

By comparison, the management planning techniques applied by the Forest Service are far superior. For example, the plan for the LoLo National Forest in western Montana is based on a computerized mapping system that demarcates 28 different kinds of forestland, each with a particular pattern of wood fibers, soil conditions and wildlife, and each with its own specialized management strategy. Every year the Forest Service takes new surveys of portions of the LoLo National Forest to update its inventory, and enters that data into a computer system that can be accessed by any of its rangers.[144]

The Flathead Indian Reservation borders the National Forest on the east, and its timber resources are a major source of potential income for the seven thousand Indians who live there. Yet the BIA, which employs only two professional forest planners nationwide, still uses an inventory and planning system for Flathead that is simplistic and outdated, providing only aggregate data for the whole reservation, while leaving the 28 specific land-types undifferentiated.[145]

BIA also has been unable to take advantage of favorable market conditions for timber products. On the Navajo Reservation, BIA's delays in timber sales almost forced a tribal sawmill to shut down operations. Ironically, BIA's marketing efforts are also hampered by the cyclical nature of timber prices. When prices are low, and less timber is being sold, BIA lays off employees. As prices rise and tribes wish to increase their timber sales, they often find themselves constrained by the inability of the reduced BIA staff to handle the higher sales volume. One forestry consultant who questioned the BIA's willingness to seize new opportunities in the marketplace was told that it would take "two years for us to respond to that." [146]

Unfortunately, the problems in marketing sometimes go beyond personnel shortages. One tribe continued to sell logs for $16 to $40 per thousand board feet at a time when the export price for those same logs exceeded $1,000 per thousand board feet. It was not until a private consultant pointed out this enormous disparity that the BIA supported the tribe's entrance into the export market.[147]

Not surprisingly, tribes have increasingly used "Self-Determination" contracts to take over their forestry programs from the BIA, often with much success. But the BIA has made these efforts unnecessarily difficult by putting bureaucratic necessities ahead of tribal needs.[148]

For example, last year the Quinault Nation's Forestry Management Program, one of the most advanced tribal programs, repeatedly faced a complete shutdown because BIA contract funds arrived in an unpredictable, piecemeal fashion. BIA initially told the tribe that its contract was being cut by 71 percent, thus forcing the tribe to operate on a week-to-week basis. Eventually, however, BIA restored funding for the Quinault contract by providing five additional installments, the last one coming only days before the end of the fiscal year. The leaders of the Quinault Nation were forced to expend tremendous amounts of money and energy petitioning for more funds, rather than promoting the efficient management of their timber resources and the economic development of their reservation. Under such trying conditions, even the best tribal administrators cannot properly plan the long-term future of their forests.[149]

CONCLUSION

In 1907 the Secretary of the Interior wrote President Theodore Roosevelt concerning efforts to address exploitation of Indian natural resources by various oil companies in Oklahoma. The Secretary's concerns matched the findings of the Special Committee with uncanny similarity:

> [Stopping] the monopolistic greed and commercial tyranny which has characterized the acts of certain operators in both Oklahoma and the Indian territory, whose conduct in deliberately violating their contracts or leases, and in shamefully disregarding the rules and regulations of the Department, has cost both the Indian lessor and the independent operator millions of dollars . . .[150]

More than 80 years later, the greed of some segments of corporate America and incompetence within the Department of the Interior continue to deprive American Indians of much-needed revenues from natural resources. Untold millions have been lost over the years while the federal government sits idly by.

The federal agencies today lack the direction, will and expertise to make any significant impact, and their failures have continued to harm the people that can least afford it, the American Indians.

ENDNOTES

THE FEDERAL GOVERNMENT AND AMERICAN INDIAN NATURAL RESOURCES

[1] The Special Committee would like to thank four extremely distinguished witnesses—the Honorable Archibald Cox, the Honorable Erwin Griswold, the Honorable Harold Tyler, and Leonard Garment—for illuminating the U.S. government's unique legal, historical and moral obligations to the American Indians and their natural resources.

[2] Mineral Revenues: The 1987 Report on Receipts from Federal and Indian Leases, Minerals Management Service, Department of the Interior, undated ("Mineral Revenues: 1987"); Newell Barker, Chief, Branch of Minerals, Osage Agency, BIA, Interview, Sept. 13, 1989.

[3] Greg Pyles, Chief Security Officer, Apache Corporation, Testimony, Hearings, Part 4, May 9, 1989 at p. 56; Richard James Elroy, Special Agent (FBI), Special Committee on Investigations, Testimony, Hearings, Part 4, May 9, 1989 at p. 53; Fred M. Merritt, Investigator, Special Committee on Investigations, Testimony, Hearings, Part 4, May 9, 1989 at p. 11; Charles A. Norman, Accountant/Minerals Analyst, Special Committee on Investigations, Testimony, Hearings, Part 4, May 9, 1989 at p. 12.

[4] Minerals Management Service and BIA statistics show that Koch is the largest purchaser/payor on Indian crude oil. For example, in 1987, Koch paid Indian royalties of over $9.5 million; the next largest oil payor, Texaco, paid slightly less than $5.8 million in Indian royalties while Amoco followed with $5.7 million. In addition, it is important to note that the Koch figures do not include arrangements whereby Koch acts as purchaser only, with royalty payment responsibility maintained by the producer or operator. If the purchaser is not actually paying the royalties, that purchaser in all likelihood will be unaware of the identity of the owners, such as Indians. *See* notes 2 and 3 *supra*.

[5] Norman, May 9 at p. 12. Koch Industries, based in Wichita, Kansas, is the largest privately-held oil company in the United States. Id. *See also Statement by Koch Industries, Inc.*, before the Special Committee on Investigations, Select Committee on Indian Affairs, U.S. Senate, June 8, 1989 at p. 41.

[6] Merritt at pp. 6, 10; Norman, May 9 at pp. 4–5.

[7] Merritt at pp. 6–9; Norman, May 9 at p. 5; Gene Poteet Testimony, Hearings, Part 4, May 9, 1989 at p. 66; James Spalding Testimony, Hearings, Part 4, May 9, 1989 at p. 70; Norman, May 9 at pp. 4–5.

[8] Id. at pp. 13–14; Poteet at p. 68.

[9] Randy Fetterolf, Consultant, Special Committee on Investigations, Testimony, Hearings, Part 6, May 11, 1989 at p. 35; Norman,

May 9 at pp. 14-15, 18; *see also* note 10 *infra*. Koch Industries' Vice President for Crude Oil testified that Koch Oil Company's total 1988 profits were "around 30 million" dollars. William M. Houghland Testimony, Deposition, Apr. 24, 1989 at p. 6.

[10] The following chart is illustrative:

	Oklahoma-wide		Company-wide	
	Barrels*	Value**	Barrels*	Value**
Koch:				
1986	240,680	$3,631,726	803,874	$12,171,215
1987	239,206	4,275,930	671,144	11,900,860
1988	142,422	2,191,177	474,281	7,110,355
Sun:				
1986	N/A	N/A	N/A	N/A
1987	−11,711	−207,888	−13,997	−247,986
1988	−6,709	−83,691	−13,899	−188,056
Conoco:				
1986	351	3,014	−1,927	−4,030
1987	−386	2,799	−3,621	−45,345
1988	375	12,015	12,165	204,722
Kerr-McGee:				
1986	−4,941	−70,828	−5,885	−89,099
1987	−9,564	−172,501	−9,580	−174,739
1988	−19,796	−311,781	−23,586	−369,593
Phillips:				
1986	908	13,747	10,051	152,172
1987	2,181	38,669	11,468	203,328
1988	−456	−6,835	−722	−10,823

*All barrel figures were provided by the companies themselves, under oath, in response to questions by the Special Committee. A positive number connotes an "overage," a negative number means that the company was "short."

**Dollar over/short figures were supplied to the Special Committee by Sun (who submitted their dollar figures late; chart now amended), Conoco, Kerr-McGee and Koch. Because Phillips did not calculate dollar figures, the Committee used Koch's value-per-barrel figures since they were close to industry averages and, according to Phillips, would be representative figures for its product. Phillips, Sun, Conoco and Kerr-McGee were all forthcoming and cooperative with the Committee.

See also note 9 *supra*.

[11] *See generally* Elroy, May 9 at pp. 33-49.

[12] Id. at pp. 33-39.

[13] Id. at pp. 35-36; Surveillance/Back-gauging Reports, Special Committee on Investigations, Apr. 1989.

[14] Elroy, May 9 at pp. 37, 39-40; Koch Gauger Interview, Apr. 1989; Surveillance/Back-gauging Reports, Fred Merritt, Investigator, Special Committee on Investigations, Mar. 1989.

[15] Elroy, May 9 at pp. 36-38; Memorandum, Fred Merritt, Investigator, Special Committee on Investigations to Wick Sollers, Special Counsel, Special Committee on Investigations re: Surveillance of Indian Leases, Apr. 18, 1989; Surveillance/Back-gauging Reports,

Merritt, *Mar.* 1989. A number of the back-gaugings and covert surveillances occurred on the Osage Reservation.

[16] Elroy, May 9 at pp. 39–40; Koch Gauger Interview, Apr. 20, 1989.

[17] Elroy, May 9 at pp. 40–42; Koch Gauger and Supervisor Interviews, Apr. 11, 12, 16, 17, 18 and 19, 1989 (tape-recorded). Many of these employees confessed to widespread theft on the Osage Reservation.

[18] Id.

[19] Id. These instructions applied to Indian and non-Indian lands alike, without distinction.

[20] Elroy, May 9 at pp. 42, 48; *see* note 17 *supra;* Keith Langhoffer, Vice-President, Operations, Koch Service, Inc., Testimony, Deposition, Apr. 24, 1989 at p. 20. Current Koch employees sought confidentiality for their statements because they uniformly asserted that Koch would terminate them if their statements came to light. For that reason, and because the Special Committee has now referred the matter to the Department of Justice for criminal investigation, the names of current employees are not part of this section. Elroy, May 9 at pp. 42–43.

[21] Spalding at pp. 70–72.

[22] Elroy, May 9 at pp. 44–45; Donald Stark Interview, Apr. 17, 1989.

[23] Elroy, May 9 at p. 45; Steve Chin Statement.

[24] Elroy, May 9 at p. 45; Bill Kirtin Statement.

[25] Elroy, May 9 at p. 45; Dennis Krocker Statement, Jan. 18, 1989.

[26] The Committee's findings are not based on any single source. Moreover, the Committee received additional evidence which is not presented in this report because it is cumulative and redundant. Many of the interview statements, obtained initially in the course of private litigation brought by William Koch against his brothers' company, were also verified by Committee investigators. However, since only some of the more than 50 ex-employees who gave statements were reinterviewed, the committee did not rely on unverified statements in its findings. Elroy, May 9 at pp. 44–46; *See e.g.* John Talbert Statement, Mar. 3, 1988; David Engg Statement, Aug. 18, 1988; Bobby Dale Cheatham Statement, Sept. 28, 1988; Martin Goode Statement, Oct. 28, 1988.

[27] Elroy, May 9 at p. 44; Former Koch Board Member (not William Koch), Interview, May 1989. This former Board member was one of the additional former employees and corporate officers not identified through litigation, whose names are not part of the report because of the pending criminal investigation. *See* note 20 *supra.*

[28] For example, Mark Fischer of Chaparral Energy in Oklahoma testified that Koch was routinely taking undocumented oil from his leases. Throughout 1988 and 1989, Fischer found Koch consistently mismeasuring in its favor. Moreover, Slawson Oil, another producer on Indian lands, also discovered that Koch's consistent pattern of mismeasurement caused substantial losses. Mark Fischer Testimony, Hearings, Part 10, May 18, 1989 at p. 20; Fischer Interviews, May and Sept. 1989. As recently as February 1989, a California-based oil company, Anacora-Verde, broke off business relations

with Koch and now finds that its new purchaser, Enron, measures substantially more oil from the exact same tanks. Albert Mooney, Anacora-Verde, Statement, May 5, 1989 (Hearings, Part 4, May 9, 1989 at pp. 98-101). Apache is another company which has found Koch mismeasurement. *See* notes 32-33 *infra* and accompanying text; Jo M. Noack, Assistant Attorney General, Office of State Tax Commission, North Dakota, Interview, Sept. 19, 1989. *See also* Notice of Determination, Koch Oil Company from Kent Conrad, Tax Commissioner, State of North Dakota, July 28, 1986.

[29] Poteet at pp. 66-67; Elroy, May 9 at p. 42.

[30] Poteet at pp. 67-68.

[31] Id.

[32] Pyles at pp. 55, 58, 61.

[33] Poteet at p. 68; Pyles at pp. 60-61.

[34] Charles Koch, Chairman and CEO, Koch Industries, Testimony, Deposition, Apr. 24, 1989 at pp. 13, 16, 33, 44.

[35] *See* notes 9 and 10 *supra*.

[36] Senators Dennis DeConcini and John McCain, Chairman and Co-Chairman, Special Committee on Investigations, Hearings, Part 5, May 10, 1989 at p. 1. *Statement by Koch Industries, Inc.*, June 8, 1989 at pp. 1-3. Koch has also submitted claims, including work performed for it by Peat Marwick Main & Company, its long-time accounting firm, that the Committee's data and witnesses are unreliable—even though the data was all subpoenaed under oath and the witnesses made confessions of criminal conduct, against their own self-interest, to the FBI.

[37] Koch counsel acknowledged the interview in a letter, asserting it was "professional and polite and perfectly proper." Letter, Joel Jankowsky, Esq. and John J. McDermott, Esq. to Kenneth Ballen, Chief Counsel, Special Committee on Investigations, Aug. 18, 1989.

[38] To protect further investigation, the names of other suspect companies have not been disclosed because the level of evidence against them is not as overwhelming as the proof against Koch. This evidence has been forwarded to the Department of Justice as well.

[39] This estimate is cumulative from 1983. Although impossible to quantify precisely, the Committee's estimate is based on the subpoenaed data of over 30 natural resource companies and statements of oil industry personnel. *See also* Elroy, May 9 at p. 53.

[40] Elroy, May 9 at pp. 39, 61.

[41] Norman Testimony, Hearings, Part 5, May 10, 1989 at pp. 3-5; Subpoenaed and other company data. The natural gas producer's data did not identify the purchasers, but only a fraction of the mismeasurement affected Indians.

[42] While BLM has a law enforcement division, the Secretary has not delegated to them the authority over oil and gas on Indian lands, nor does any other Interior Department agency exercise authority in this area. BLM inspectors therefore must report theft to outside law enforcement agencies. Jim Sims, District Manager, BLM (Tulsa, Oklahoma), Testimony, Hearings, Part 5, May 10, 1989 at pp. 17, 41. Walter Johnson, Chief, Law Enforcement Division, BLM, Testimony, Hearings, Part 5, May 10, 1989 at pp. 14-17; Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1701 *et seq.*

[43] All data on the chart was provided by BLM as of May 1989. Sims at pp. 40–43; Bob Goodman, Supervisor, Inspection and Enforcement, BLM (Tulsa), Testimony, Hearings, Part 5, May 10, 1989 at p. 47.

[44] Id. at pp. 42–44; Dale Pylant, Director, Oil and Gas Inspection, BLM (Oklahoma City), Testimony, Hearings, Part 5, May 10, 1989 at p. 45; Goodman at p. 48; Pyles at p. 53.

[45] Goodman at pp. 48–49, 53–54; George Brown, Deputy Assistant Director, Energy and Mineral Resources, BLM, Testimony, Hearings, Part 5, May 10, 1989 at p. 55.

[46] Answers to Interrogatories of the Special Committee on Investigations ("Special Committee Interrogatories") issued Apr. 14, 1989, #22.

[47] Goodman at pp. 48–49.

[48] Id. at p. 49; Sims at p. 43; Pylant at p. 46.

[49] Sims at p. 44; Goodman at p. 49.

[50] Brown at pp. 51, 53.

[51] Id. at p. 53.

[52] Senator Dennis DeConcini, Chairman, Special Committee on Investigations, Hearings, Part 5, May 10, 1989 at p. 53.

[53] Manuel Lujan Jr., Secretary of the Interior, Testimony, Hearings, Part 11, June 8, 1989 at p. 11; Minutes of BIA/BLM/MMS Steering Committee Meeting, Department of the Interior, Aug. 16–17, 1989 at p. 13.

[54] Norman, May 9 at pp. 2–3; Fiscal Accountability of the Nation's Energy Resources, Linowes *et al.*, Jan. 1982 ("Linowes Report") at p. 14.

[55] *See* "Oil and Gas Payor Handbook," Minerals Management Service, Royalty Management Program, Volume 2; "PIF Desk Manual," Minerals Management Service, Royalty Management Program.

[56] Fetterolf at pp. 35–36, 45–46.

[57] Id. at pp. 34–35; *See also* Thomas Shipps *et al.* Southern Ute Tribe, Testimony, Hearings, Part 6, May 11, 1989 at pp. 2–17; Wes Pettingill *et al.* Ute Tribe of Utah, Testimony, Hearings, Part 6, May 11, 1989 at pp. 17–24; Richard Ortiz *et al.* Wind River Tribes, Testimony, Hearings, Part 6, May 11, 1989 at pp. 24–33.

[58] Fetterolf at pp. 37–43; Shipps at p. 6; George Adams, Auditor, Natural Resources Department, Ute Tribe of Utah, Testimony, Hearings, Part 6, May 11, 1989 at p. 20; Ortiz at p. 26.

[59] Fetterolf at pp. 37–41; Shipps at pp. 7–8; Adams at p. 20; Ortiz at p. 26; Jeffrey P. Southwick Testimony, Hearings, Part 7, May 12, 1989 at p. 35.

[60] A vertically integrated producer, for example, would own the oil at the lease site, transport the oil and then refine it, rather than selling it to an outside purchaser at the lease site. Barry Williamson, Director, Minerals Management Service, Testimony, Hearings, Part 7, May 12, 1989 at p. 61; Fetterolf at pp. 37–38.

[61] Answers to Special Committee Interrogatories #7, #19, #20; Williamson at pp. 60–61; Donald Sant, Deputy Associate Director for Valuation and Audit, Minerals Management Service, Testimony, Deposition, Apr. 21, 1989 at pp. 29–30.

[62] *See* "Notice to Lessees and Operators of Federal and Indian Onshore Oil and Gas Leases Number 5," (NTL–5), Department of

the Interior, issued May 1, 1977; Notice to Lessees Numbered 5 Gas Royalty Act of 1987, P.L. 100-234 (Jan. 6, 1988), 101 Stat. 1719; "Lessees Numbered 5 Gas Royalty Act of 1987" 53 Fed. Reg. 5654, Feb. 25, 1988 at p. 5656; Fetterolf at pp. 39-41.

[63] Answers to Special Committee Interrogatories, #7, #19, #20.

[64] For instance, the government has required companies to use dual accounting when valuing processed natural gas from Indian lands, to maximize royalties based on the higher of unprocessed or processed gas values. At least eight companies paying Indian royalties have not used dual accounting when valuing processed gas. Two of these companies may have erroneously interpreted federal regulations as requiring dual accounting only after February 1988. In addition, the Southern Ute Tribe, with a reservation rich in natural gas, has found that most lessees on its reservation do not perform dual accounting, thus causing royalty underpayments. Answers to Special Committee Interrogatory #27; Shipps at p. 8; Fetterolf at p. 41.

[65] Id. at p. 42.

[66] Tribes feel that the abuse of deductions and allowances by companies may be even greater in the future due to a new deduction and allowance system implemented by MMS since February of 1988. Companies may now obtain unquestioned approval for allowances and deductions by simply submitting a form to MMS. Milton Dial, Chief, Royalty Valuation and Standards Division, Minerals Management Service, Testimony, Deposition, Apr. 21, 1989 at pp. 96-100; Shipps at p. 7; Answers to Special Committee Interrogatories #3, #8, #11, #12; *See Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); "Dear Payor" letters, Minerals Management Service, both signed by James R. Detlefs, Chief, Fiscal Accounting Division, MMS, Feb. 14, 1986, and Oct. 3, 1988; Adams at pp. 20, 23-24; Ortiz at p. 26.

[67] In 1987 oil and gas accounted for about 65 percent of all Indian royalties collected by MMS. Coal accounted for an additional 30 percent. It is important to note that the risk of underpayments on coal royalties is currently much less than royalties paid on oil and gas. Only a few coal leases exist on Indian lands. Due to the large amount of royalty generated on each of these few leases—they represent some of the largest royalty-producing leases reported to the federal government—coal leases have been monitored regularly by tribal authorities. And although past federal investigations into the area of Indian royalties have not dealt extensively with coal, federal audits of Indian coal leases have occurred frequently, unlike Indian oil and gas leases. *See e.g.* "Federal and Indian Coal Royalty Payments, Minerals Management Service," Office of Inspector General, Department of the Interior, C-LM-MMS-09-87, May 15, 1987; Mineral Revenues: 1987; Fetterolf at p. 45.

[68] The Special Committee emphasizes the word "potential" in all its estimations of royalty underpayments because not all dollar amounts may be collectible. A portion of these estimated underpayments involve interpretive issues where a company has taken a position on an unresolved issue (such as product valuation) and that position results in a lower royalty payment. If the issue were resolved by the federal government through audit or guidelines, the

lower payment may be justified. The Special Committee also realizes that some of its estimated underpayments result from payments made and violations of federal regulations implemented years ago. The ability of Indian lessors to recover potential underpayments from such periods may be limited, or even impossible. Fetterolf at pp. 44-46.

[69] Id. at pp. 45-47.

[70] Id. at pp. 47-48; Shipps at p. 6; Pettingill at pp. 18-19; Ortiz at p. 25.

[71] MMS is responsible for collecting all Indian royalties, with the exception of royalties paid to the Osage tribe in Oklahoma. In addition to Indian royalties, MMS is also responsible for collecting and monitoring royalties and bonuses derived from the leasing of federal lands. Royalties collected by MMS derived from Indian lands comprise only 2.76 percent of all monies collected by MMS. *See* Mineral Revenues: 1987.

[72] Norman Testimony, Hearings, Part 5, May 11, 1989 at p. 51; "Status Report on Program Accomplishments," Royalty Management Program, MMS, July, 1988 at pp. i-vii; Mineral Revenues: 1987.

[73] Fetterolf at pp. 35-36; Linowes Report at p. 14.

[74] The statute authorizing MMS to issue penalties, the Federal Oil and Gas Royalty Management Act (FOGRMA), contains a provision that lessens the deterrent impact of MMS penalties. According to FOGRMA, upon notice by MMS, companies have thirty days to cure violations before penalties can be assessed. 30 U.S.C. § 1710 (a)(B); Linowes Report at p. 15; U.S. Congress, House, Committee on Government Operations, *Indian Oil and Gas Payments: Problems Persist,* 98th Cong., 1st Sess., July 19, 1985, H.R. Rep. No. 99-214 at p. 18; U.S. Congress, House, Hearings Before the House Appropriations Subcommittee on the Department of the Interior and Related Agencies, 99th Cong., 2d Sess., Part 12, Sept. 25, 1986 at pp. 36-37; Norman, May 11 at pp. 53-56; Williamson at pp. 55-57.

[75] MMS claims that it has audited one-third of the Indian leases subject to its jurisdiction. Williamson at p. 58.

[76] Norman, May 11 at pp. 51-53; Williamson at pp. 50-52, 59-60; Jimmy W. Mayberry, Deputy Associate Director for Collection and Disbursement, MMS, Testimony, Deposition, Apr. 21, 1989 at p. 20; Kenneth M. Moyers, Chief, Royalty Compliance Division, MMS, Testimony, Deposition, Apr. 21, 1989 at pp. 11-14, 19-20; DOI/IG Report—"Mission Accomplishment Royalty Compliance Division, Royalty Management Program," E-LM-MMS-07-87E, Apr. 1988 at p. 3.

[77] MMS has cooperated fully with the Special Committee's investigation and the current Director, Barry Williamson, appointed in early 1989, has evidenced a commitment on behalf of MMS to provide much-needed recognition of Indian interests. Recently, the Director created a task force to propose internal actions which have addressed some of the problems uncovered during the Special Committee's hearings. Proposed Improvement Initiatives for Indian Tribes and Allottees, Minerals Management Service, July 1989; Detlefs Deposition at pp. 117-18, 122-23; Norman, May 11 at p. 51.

[78] The unique situation and dilemmas faced by Indian allottees are discussed separately in a later portion of this chapter.

[79] Minerals Revenues: 1987; Shipps at p. 3; Ortiz at p. 31; Pettingill at p. 22.

[80] Shipps at pp. 3-4.

[81] Id. at pp. 3-6; Karen Anderson, Accountant, Minerals Resource Division, Southern Ute Tribe, Interview, Mar. 22, 1989.

[82] Ortiz at pp. 24-26.

[83] Shipps at p. 6; Pettingill at pp. 18-19; Ortiz at pp. 24-25.

[84] Anderson Testimony, Hearings, Part 6, May 11, 1989 at pp. 8-9; Adams at p. 20; Ortiz at pp. 25-26.

[85] Anderson Interview; Ortiz Interview, Mar. 23, 1989.

[86] Section 202 of the Federal Oil and Gas Royalty Management Act allows MMS and Indian tribes to enter into "cooperative agreements" or "202 agreements" whereby the tribe and MMS work together to audit tribal leases. 30 U.S.C. § 1732.

[87] Anderson at pp. 11-12; Adams at p. 20; Norman, May 11 at p. 57; Todd McCutcheon, Chief, State and Tribal Program, MMS, Testimony, Deposition, Apr. 21, 1989 at p. 74.

[88] Id. at p. 56; Adams at p. 21.

[89] Anderson at pp. 9, 15.

[90] *Cotton Petroleum Corp.* v. *New Mexico,* 109 S. Ct. 1698 (1989); Kevin Gover Testimony, Hearings, Part 6, May 11, 1989 at p. 28; Shipps at pp. 10-11.

[91] Ortiz at pp. 26-27; Gover at pp. 27-33; Shipps at pp. 10-11; Pettingill at pp. 21-22.

[92] Felix Cohen *et al, Felix S. Cohen's Handbook of Federal Indian Law,* 1982 ed. (Charlottesville, VA: Michie, 1982) at pp. 612-21.

[93] Steve Moore, Attorney, Native American Rights Fund, Testimony, Hearings, Part 7, May 12, 1989 at p. 4.

[94] Id. at pp. 4-5.

[95] 30 U.S.C. § 1715; U.S. Congress, House, "Federal Oil and Gas Royalty Management Act of 1982," H. Rep. No. 97-859, 97th Cong., 1st Sess., Sept. 23, 1982 at p. 30. *See* Linowes Report and related hearings; Moore at pp. 4-5; Kenneth Young, BIA Oil and Gas Division, Bureau of Indian Affairs, Testimony, Hearings, Part 7, May 12, 1989 at pp. 18-19; Southwick at pp. 28-31.

[96] *Indian Oil and Gas Payments: Problems Persist* at pp. 9-12; "Indian Royalties: Interior Has Not Solved Indian Oil and Gas Payment Problems," General Accounting Office, GAO/IMTEC-86-13, Mar. 1986 at pp. 15-21.

[97] Moore at pp. 4-5; Houston and Velma Decker Testimony, Hearings, Part 7, May 12, 1989 at pp. 6-7; Mary Limpy Testimony, Hearings, Part 7, May 12, 1989 at p. 9; Yvonne and Richard Curry Testimony, Hearings, Part 7, May 12, 1989 at pp. 23-24; Williamson at p. 68; Southwick at pp. 28-32; Vern Ingraham, Director, Office of External Affairs, MMS, Testimony, Hearings, Part 7, May 12, 1989 at pp. 45-46.

[98] The lawsuit involving Limpy, *Kauley* v. *United States,* was initiated in December of 1984 by Oklahoma Indian Legal Services on behalf of Limpy and other allottees. Although almost five years have passed since Limpy and the other allottee parties filed their initial complaint, the lawsuit has not been resolved and settlement negotiations continue today. Moore at pp. 1-2, 15; Limpy at pp. 9-12.

[99] Yvonne and Richard Curry at pp. 23–24.

[100] Houston and Velma Decker at pp. 5–8.

[101] Southwick at pp. 31–33.

[102] Id. at p. 36.

[103] Houston and Velma Decker at pp. 6–8.

[104] Id.

[105] Ervin Chavez Testimony, Hearings, Part 6, May 11, 1989 at pp. 60, 62; Alan R. Taradash Testimony, Hearings, Part 6, May 11, 1989 at pp. 60–64.

[106] Young at p. 17; Williamson at pp. 64–70.

[107] The organization responsible for approving changes at MMS, the Royalty Management Advisory Committee, consists of 26 members, only one of whom represents Indian allottees. Eddie Jacobs Testimony, Hearings, Part 6, May 11, 1989 at p. 71; Ingraham at pp. 43, 47–49.

[108] Limpy at p. 11; Moore at p. 13.

[109] *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970); Wilma Mankiller, Chief, Cherokee Nation, Testimony, Hearings, Part 10, May 18, 1989 at pp. 2–3, 5–6; Hollis Roberts, Chief, Choctaw Nation, Testimony, Hearings, Part 10, May 18, 1989 at pp. 3, 8–9; Bill Anoatubby, Governor, Chickasaw Nation, Testimony, Hearings, Part 10, May 18, 1989 at pp. 3–5; Gary Kopach, Bureau of Land Management, Interview, May 17, 1989; *See* 25 U.S.C. § 176.

[110] Anoatubby at p. 6; William Foster Interview, May 17, 1989.

[111] Letter, C. F. Larrabee, Acting Commissioner on Indian Affairs to Jesse Wilson, Secretary of the Interior, Mar. 27, 1908.

[112] Mankiller at pp. 2–3; Roberts at pp. 3, 8–9; Anoatubby at pp. 3–5; Confidential Interview with a Bureau of Indian Affairs official; Merritt Youngdeer, Area Director, BIA (Muskogee, Oklahoma), Testimony, Deposition, Apr. 19, 1989 at p. 7. When asked whether the BIA had fully protected the tribal natural resources on the Arkansas Riverbed, Jack Chaney, a BIA Trust Officer, testified, "We would probably have to say we have not." Jack Chaney, BIA (Muskogee, OK), Testimony, Deposition, Apr. 19, 1989 at p. 22.

[113] Chaney Interview, Apr. 19, 1989.

[114] Anoatubby at pp. 5–6; Tina Jordan, Attorney, Arkansas Riverbed Authority, Testimony, Hearings, Part 10, May 18, 1989 at p. 19; Jordan Interview, May 18, 1989.

[115] William Foster, Testimony, Hearings, Part 10, May 18, 1989 at pp. 14–15; Jordan Interview. The tribes also have lost between $300,000 and $2 million per year in oil and gas revenues on Riverbed and non-Riverbed lands due to BIA's failure to lease subsurface rights. Fischer at pp. 20–21.

[116] William Walker, Vice President, Stephens Production Company, Testimony, Hearings, Part 10, May 18, 1989 at pp. 23–25.

[117] Jordan at p. 18.

[118] Id. at pp. 17–19.

[119] Curtis Canard, Tribal Geotechnical Services, Inc., Testimony, Hearings, Part 9, May 16, 1989 at pp. 31–33, 45.

[120] Id. at pp. 33–34.

[121] Elmer Manatowa, Chief, Sac and Fox Nation, Testimony, Hearings, Part 9, May 16, 1989 at p. 35; William Rice, Attorney General, Sac and Fox Nation, Testimony, Hearings, Part 9, May 16, 1989 at pp. 44–45.

[122] Canard at pp. 31-34.

[123] Timothy Vollmann, Southwest Regional Solicitor, Department of the Interior, Testimony, Hearings, Part 9, May 16, 1989 at p. 51; Joe Walker, Assistant Area Director, BIA (Anadarko, Oklahoma Office), Testimony, Hearings, Part 9, May 16, 1989 at p. 49. The Sac and Fox and Cherokee Nations have finally received increased attention to their litigation delay problems due to the arrival in 1988 of Southwest Regional Solicitor Tim Vollmann. Mankiller Interview, May 17, 1989; Manatowa Interview, May 16, 1989.

[124] Truman Carter, Treasurer, Sac and Fox Nation, Testimony, Hearings, Part 9, May 16, 1989 at pp. 38, 44.

[125] Ralph Tarr, Solicitor, Department of the Interior, Statement, July 19, 1989. *See Oklahoma Tax Commission* v. *Graham*, 109 S. Ct. 1519 (1989); *Mississippi Band of Choctaws* v. *Holyfield*, 109 S. Ct. 1957 (1989).

[126] Letter, Mille Lacs Band of Chippewa Indians to Special Committee on Investigations, Feb. 23, 1989.

[127] Reid Chambers, Testimony, Hearings, Part 1, Jan. 30, 1989 at p. 68; Dennis Daugherty, former Associate Solicitor for Indian Affairs, Department of the Interior, Interview, Sept. 18, 1989.

[128] Issue Paper/Report: "Spokane Reservation Open-Pit Uranium Mine Reclamation," Bureau of Indian Affairs, Sept. 1987 at pp. 1-5, 7.

[129] Id. at pp. 6-7.

[130] Id. at p. 7; Joe Flett, Chairman, Spokane Tribe, and Bruce Wynne, Spokane Tribal Councilman, Interview; Marjane Ambler, "The Lands the Feds Forgot," *Sierra Magazine*, May/June 1989 at pp. 44-48.

[131] Id.

[132] 30 C.F.R. 750.6; Michael O'Connell, Attorney, Hopi Tribe, Testimony, Hearings, Part 10, May 18, 1989 at pp. 35-36, 39; Ivan Sidney, Chairman, Hopi Tribe, Testimony, Hearings, Part 10, May 18, 1989 at pp. 33-34.

[133] O'Connell at pp. 35-36, 39.

[134] Harold Bentley, Hydro Geochem, Inc., Testimony, Hearings, Part 10, May 18, 1989 at pp. 37-40.

[135] O'Connell at p. 39.

[136] Richard Baldes, Project Leader, Fish and Wildlife Management Office, U.S. Fish and Wildlife Service (Lander, Wyoming), Testimony, Hearings, Part 9, May 16, 1989 at pp. 2-3; John Washakie, Chairman, Shoshone Tribe, Testimony, Hearings, Part 9, May 16, 1989 at p. 14.

[137] Id. at pp. 6-7; Gover Testimony, Hearings, Part 9, May 16, 1989 at p. 16; Dewey Schwalenberg, Native American Fish and Wildlife Society, Testimony, Hearings, Part 9, May 16, 1989 at pp. 18-19; Letter, Max Dodson, Environmental Protection Agency to Special Committee on Investigations, May 12, 1989.

[138] Baldes at p. 6; Washakie at p. 14.

[139] Baldes at pp. 4-10; Washakie at pp. 14-15; David Allison, Superintendent, BIA Wind River Agency, Testimony, Hearings, Part 9, May 16, 1989 at pp. 21-22; Bill Martin, Assistant Commissioner, Resources Management, Bureau of Reclamation, Testimony, Hearings, Part 9, May 16, 1989 at pp. 28-29.

[140] Audit Report: "Dam Safety Program, Bureau of Indian Affairs," Office of Inspector General, U.S. Department of the Interior, Sept. 1989 at p. (i).

[141] Id. at pp. 5-6. In addition, the BIA manages the revenues accruing from American Indian natural resources. The Inspector General found that BIA could not account for at least $17 million in these funds, which may never be recovered. Audit Report: "Selected Aspects of Indian Trust Fund Activities—Bureau of Indian Affairs," Office of Inspector General, U.S. Department of the Interior, Sept. 1989.

[142] Marshall Cutsforth, Chief, Division of Forestry, BIA, Testimony, Hearings, Part 11, June 8, 1989 at pp. 71-75; Chart on BIA Annual Timber Harvest vs. Allowable Cut in Marshall Cutsforth Prepared Statement, June 8, 1989 (Hearings, Part 11, June 8, 1989 at p. 174); D. Fred Matt, President, Intertribal Timber Council, Testimony, Prepared Statement, (Hearings, Part 11, June 8, 1989 at pp. 115-16; Roy Sampsel, President, R.H.S. Resource Consultants, Testimony, Hearings, Part 11, June 8, 1989 at p. 77.

[143] Ronald L. Trosper, Tribal Economist, Confederated Salish and Kootenai Tribes, Testimony, Hearings, Part 11, June 8, 1989 at pp. 60-61; Dr. Gary S. Morishima, Executive Board Member, Intertribal Timber Council, Testimony, Hearings, Part 11, June 8, 1989 at p. 66.

[144] Trosper at pp. 58-60.

[145] Id.

[146] C. Dexter Gill, Forest Manager, Navajo Nation, Testimony, Hearings, Part 11, June 8, 1989 at p. 55; Trosper at pp. 61-62; James Spitz, Forestry Consultant, Warm Spring and Yakima Tribes, Testimony, Hearings, Part 11, June 8, 1989 at p. 69.

[147] Id.

[148] Indian Self-Determination and Education Assistance Act, P.L. 93-638 (88 Stat. 2203); Trosper at pp. 62-63; Joseph B. DeLaCruz, President, Quinault Indian Nation, Prepared Statement, Hearings, Part 11, June 8, 1989 at pp. 242-59; Morishima Prepared Statement at pp. 144-45.

[149] DeLaCruz Prepared Statement at pp. 242-44, 255-56.

[150] Letter, Secretary of the Department of the Interior (E. A. Hitchcock) to President Theodore Roosevelt, Jan. 29, 1907 at p. 5 (59th Cong., 2d Sess., S. Doc. 286, *Senate Documents*, Vol. 5).

CHAPTER 4

THE INDIAN HEALTH SERVICE

Like so many other federal agencies responsible for Indian affairs, mismanagement is pervasive at the Indian Health Service (IHS)—the agency charged with elevating the health status of Native Americans "to the highest possible level." While dire health needs of American Indians often go unmet, IHS senior executives authorized improper contracts to finance lavish fitness retreats and business meetings at luxurious resorts. Yet soon after IHS' newly-created Office of Program Integrity and Ethics documented a few of these abuses, top IHS management stripped its Director of his powers and the internal reviews ceased.[1]

THE STATUS OF INDIAN HEALTH

When Lewis Meriam and his team of investigators released their report on *The Problem of Indian Administration* sixty-one years ago, they did not mince words about the health of American Indians: "The health of the Indians as compared with that of the general population is bad." Although the gap between Indian and non-Indian health has narrowed greatly since 1928, the same conclusion still holds true today. Three out of eight Indians die before their 45th birthday, compared with only one out of eight non-Indians.[2]

Indian health is hampered not only by extreme poverty in Indian country, but by the severely limited medical resources available to reservation Indians. At one billion dollars per year, the budget of the Indian Health Service has held constant in real terms for the last decade. As the Indian population has expanded, and medical costs have risen faster than the overall cost of living, fiscal restraint has turned IHS into a "health care rationing agency," according to its Director, Dr. Everett R. Rhoades.[3]

Last year alone, IHS deferred at least 28,000 patient care services.[4] Although such delays may not initially appear too onerous, their long-term effects can be grave: minor surgery postponed last year often becomes major surgery next year. On one reservation in Montana, for instance, services deferred in 1989 included surgical biopsies, obstetrical examinations, mammographies, psychiatric care for suicidal teens, and sexual abuse evaluations.[5]

Although most IHS doctors are extremely dedicated, their ability to provide adequate medical services often is jeopardized by a debilitating clinical overload. While the typical metropolitan area has one doctor for every 500 people, IHS physicians are expected, on the average, to serve 1,400 Indians. IHS' inability to recruit and retain a significant number of Indian doctors—only 24 of IHS' 700 physicians are Indians—exacerbates this shortage. About 200 doctors leave IHS every year, and many of those who remain suffer from "burnout" and exhaustion.[6]

Even more disturbing to many IHS physicians is the Service's poor management. According to Dr. Bruce Nicholson, the former clinical director at the Pine Ridge Indian Reservation, IHS administrators "were spending money on conferences and air travel when we were desperately asking for more nurse midwives and Ob-Gyn services to combat infant mortality." [7]

Similar stories are commonplace within IHS, everyday reminders of the essential link between administrative management and health care delivery in a time of growing demand and limited resources. While investigations by the Special Committee and others have focused on weaknesses in IHS' Office of Administration and Management, especially in the areas of procurement, finance and personnel, the experiences of Dr. Nicholson and other medical practitioners clearly demonstrate that problems of administrative management and health care delivery are closely linked at IHS.

THE INSPECTOR GENERAL AND IHS

The Department of Health and Human Services' Office of the Inspector General, which conducted 75 investigations of IHS in the last five years, has exposed serious management problems at four of the eleven IHS Area Offices. Assistant Inspector General for Investigations Larry Morey testified before the Committee that those findings are merely symptomatic of the "fraud and gross abuse" that pervade IHS.[8]

Morey and his agents discovered that the Directors of various Area Offices, as well as top Headquarters personnel, repeatedly misused health care funds to finance extravagant meetings at expensive resorts such as Mackinac Island, Bar Harbor and Miami Beach. The Director of IHS initially defended these far-flung resort locations by noting their proximity to certain smaller reservations. However, after the Special Committee's public hearing, the IHS Director reversed himself, saying, "In retrospect, the selections of some locations for these meetings were inappropriate." [9]

Moreover, in the last five years the Inspector General's Office of Audit recommended changes that it estimates would have saved the Indian Health Service more than $37 million, but IHS chose not to take the necessary corrective actions. Through both audits and investigations, the Inspector General's office has detected a "pattern of ignoring rules and regulations with respect to contracts, grants and administrative matters" and generally failing "to address areas vulnerable to fraud, waste and abuse." Assistant Inspector General Morey concluded that "providing the quantity and quality health care for indigent American Indian citizens is too vital for IHS to continue tolerating [this] waste of program funds." [10]

THE ALBUQUERQUE AREA OFFICE

The Special Committee's own investigation corroborated the Inspector General's findings. One of the many examples of a pattern of administrative abuse involves IHS' Albuquerque Area Office, the regional office responsible for meeting Indian health needs in New Mexico and Colorado.

Over a two-year period, Albuquerque Area Director Josephine Waconda and her Executive Officer, Art Ray, signed more than a dozen illegal contracts, or "Memoranda of Agreement," rather than subject projects to the scrutiny of a trained federal procurement officer.[11] By doing so, they facilitated the purchase of almost a quarter of a million dollars' worth of goods and services with little or no regard to the price or propriety of the expenditures. In fact, none of the major expenses incurred by these Memoranda of Agreement was ever competitively bid—a violation of the basic principle that runs through all federal procurement policy and ensures American taxpayers that they are getting their money's worth.[12]

Furthermore, the Area Director's predilection for skirting federal rules and regulations eventually spread to other members of her staff. On at least two occasions, the signatures of contractors were apparently forged by an IHS employee. One of the apparent forgeries was made in connection with a conference at the Sunrise Springs Resort near Santa Fe, New Mexico.[13] Although it was billed as "a week-long didactic and experiential prototype management seminar," it was in reality a fitness retreat for IHS administrators.[14]

The Sunrise Springs event was conceived by IHS Headquarters staff who asked the Albuquerque Area Office to hold a Health Promotion/Disease Prevention (HP/DP) fitness retreat that would serve as a model for other IHS offices, including Headquarters. The retreat's stated purpose was "to effectively influence health-related behavior in the Indian communities [through] a variety of intervention/prevention strategies, including personal staff commitment to healthy lifestyles." A videotape of the retreat, featuring a brief introduction by the IHS Director, would be distributed widely to inspire similar activities for IHS administrators across the nation.[15]

The assumption, based on the so-called "dispersion theory," was that healthier lifestyles would eventually "trickle down" from the top IHS bureaucrats to the Indian population. While the retreat was designed, in part, to serve tribal leaders, only two tribal representatives attended Sunrise Springs. Most of the other three dozen participants were managers from IHS Headquarters or the Albuquerque Area Office.[16]

Although the Headquarters Branch Chief most closely involved with the planning of Sunrise Springs testified that it "wasn't a retreat—it was a very intense training effort," the agenda for Tuesday, March 8, 1988, was typical:

6:30–7:30 a.m.	Exercise
8:00	Breakfast
9:00	Consultations

10:00	Seminar on "Exercise Without Pain"
11:30	Stretching
12:00	Lunch
1:00 p.m.	Mini-Seminar on "Getting More Results with Less Effort: Empowering People In a Healthy Organizational Climate"
2:30	"Olympics of Fitness" Event—Scavenger Hunt
3:15	Refreshments
3:30	Team Meeting
3:40	Exercise
6:00	Dinner
7:30	Campfire [17]

The total budget for this effort was more than $70,000, including several thousand dollars for "pro athlete" satin warm-up jackets, buttons saying "Catch Me Doing Something Right," patches, bumperstickers, visors, decals, trophies and certificates. More than $13,000 was paid directly to the Sunrise Springs Resort for rooms, meals and service charges—as well as massage therapy, acupuncture and "alpha chamber wellness services for stress reduction"—services more commonplace at Club Med than on the typical Indian reservation.[18]

The whole Sunrise Springs affair would have an almost farcical quality were it not for one additional fact: the retreat was paid for with funds appropriated by Congress for the Indian Juvenile Alcohol and Drug Abuse Prevention Program. Because such a blatantly improper use of funds would not have survived the stringent federal procurement procedures, the Area Director completely circumvented her own contracting office by signing an illegal Memorandum of Agreement to finance the retreat.[19] When the Committee first exposed this misuse of juvenile alcoholism prevention funds, Dr. Rhoades attempted to justify the expenditure by claiming that massage therapy and acupuncture are "widely accepted treatment modalities" for alcohol abuse. He did not explain how giving IHS managers these treatments would help free Indian teenagers from their dependence on alcohol.[20]

THE BEMIDJI AREA OFFICE

Meanwhile, a thousand miles away at the Bemidji (Minnesota) Area Office, top IHS administrators were engaged in a similar pattern of waste and abuse. In violation of federal regulations, the Bemidji Area Director, Alan Allery, and two of his aides regularly approved their own travel vouchers and then threatened to fire any employee who reported suspicious travel claims. Allery was eventually convicted on two felony counts of filing false claims against the United States, and sentenced to federal prison. Two other IHS employees in the Bemidji Area were convicted on similar charges.[21]

The Committee found that the problems at Bemidji were not limited to fraudulent travel vouchers. For years IHS officials funneled money through improper contracts with a local tribe to pay for various conferences and meetings. By circumventing the normal procurement process, funds that could have been used for medical care or health education activities were instead spent on personal items and extravagant retreats.[22]

A substantial portion of the $155,000 spent by the Bemidji Area on Health Promotion/Disease Prevention (HP/DP) conferences in the last three years paid for meals of IHS participants (who also received a per diem and thus were double-dipping), travel for tribal members, monogrammed baseball caps, specially-printed T-shirts, and unnecessary bookkeeping expenses incurred by channeling money through tribal accounts. Blanket purchase orders with tribes were also misused for similar purposes. One order requested federal funds for a traditional Lakota hoop dancer to perform at local high schools. The request was initially rejected, but was quickly resubmitted and approved after the dancer's title was amended to "Alcohol Consultant." [23]

The practice of circumventing federal regulations reached an extreme in June of 1988 when the Bemidji Office hosted the quarterly meeting of the IHS Council of Associate and Area Directors (CAAD). IHS Headquarters at the time was encouraging the Area Offices to outdo each other in hosting lavish CAAD meetings, which were attended by all eleven Area Directors, as well as the IHS Director and his top assistants. Allery therefore arranged to hold the meeting neither in Bemidji nor in an accessible and affordable location, such as Minneapolis, but rather at the luxurious Mission Point Resort at Mackinac Island, Michigan. To help meet the costs of staying at the resort, the Director of IHS approved a special, one-time increase in the allowable per diem for IHS employees attending the CAAD meeting. But that was not sufficient to cover the resort's charges, including the rental of double suites with Jacuzzis, so Allery, acting without Headquarters' approval, transferred funds from the Bemidji Area's "Hospitals and Clinics" budget to a contract with a local tribe. The tribe, in turn, kept fifteen percent for its administrative expenses and paid the rest to the resort.[24]

Several weeks after the Special Committee brought this matter to light, the IHS Director, Dr. Rhoades, acknowledged that Allery "wrongly used a tribal contract to cover meeting costs that should have been paid by the meeting participants. Neither I nor the rest of the Council of Associate and Area Directors had knowledge of his actions." Dr. Rhoades added that he was "embarrassed and outraged" by Allery's methods, and assured the Committee, "when the full costs are known, we will take whatever steps are appropriate to ensure full corrective action." [25]

THE OFFICE OF PROGRAM INTEGRITY AND ETHICS

Albuquerque and Bemidji are just two examples of the mismanagement that the Special Committee, as well as the Inspector General, found throughout IHS. Ironically, it was neither the Committee nor the Inspector General that first alerted top IHS managers to these abuses—it was IHS' own Office of Program Integrity and Ethics.

After the Indian Health Service was elevated to full agency status in January of 1988, the Department of Health and Human Services issued new regulations establishing, among other things, an Office of Program Integrity and Ethics within IHS' Office of Administration and Management. The Program Integrity and Ethics staff was tasked with directing "the investigation and resolution of allegations of impropriety, mismanagement of resources, abuse of authority, [and] violations of Standards of Conduct." Six months later, Robert Stakes, a security officer with eighteen years' experience in the Department, was named IHS' first Director of Program Integrity and Ethics.[26]

In August of 1988 Stakes conducted an investigation of the Bemidji Area Office in conjunction with Special Agent Karen Sweet of the Inspector General's office.

Upon discovering evidence of extensive travel voucher fraud by Alan Allery that later led to his criminal conviction, Sweet and Stakes called for Allery's immediate suspension. Their recommendation to top IHS management was apparently ignored, as Allery retained his post for another three months, almost until the date of his indictment. During that period Allery repeatedly took reprisals against employees who he believed had cooperated with Sweet and Stakes—including one denial of promotion, several reduced performance ratings, and even a budget cut for one health program run by an informant.[27]

Shortly after the Bemidji review, the Office of Program Integrity and Ethics received an allegation from Albuquerque concerning the use of an illegal contract to purchase personal items, including expensive warm-up jackets. Stakes flew to New Mexico and proceeded to investigate the Sunrise Springs affair. Following the model of his Bemidji review, Stakes wrote a memorandum outlining his findings on Sunrise Springs, as well as eleven additional topics that might merit further investigation, and requested an opportunity to brief the Director of IHS, but the briefing never took place.[28]

In fact, the only relevant discussion Stakes had with the Director was a brief encounter in the hallway. Dr. Rhoades asked Stakes to take back a warm-up jacket he had received from the Sunrise Springs retreat, saying it was best that he not keep it. The Director never asked Stakes to discuss his findings about Sunrise Springs or the other serious problems uncovered at Albuquerque.[29]

Although none of Stakes' superiors criticized the quality of his work and Dr. Rhoades has publicly stated that the "effectiveness of IHS operations has been increased by the creation of a Program Integrity and Ethics Staff," the Office was never allowed to complete its investigations of Albuquerque or Bemidji. Based on the obvious management problems he already documented, in December of 1988, Stakes drew up a schedule that would take him to the other nine Area Offices in a twelve-month period. But it soon became apparent that his two earlier investigations, both of which raised the specter of criminal prosecution of IHS senior executives, had diminished Stakes' standing within Headquarters. "We did [these investigations] in two [Area Offices]," Stakes testified, "and we were about to do it in the third Area [Office]. I guess the approach that we took provided such startling information that they began to question whether we should keep doing those or not. [It came to] a screeching halt." [30]

At a January 1989 meeting of the Council of Associate and Area Directors, several high-level IHS administrators complained about disruptions caused by the Office of Program Integrity and Ethics. The loudest criticisms came from those who had been targets of its investigations. Stakes, who was allowed to attend part of that meeting, told the Area Directors "that they had a serious problem and that IHS had a serious problem and that I was merely a tool to help pinpoint the problems and to help with solutions." [31]

Apparently, the IHS leadership preferred to keep that particular tool on the shelf, for the Office of Program Integrity and Ethics was never again allowed to pursue a comprehensive investigation of any IHS Area Office. When Stakes received three serious allegations about another Area Office, his supervisor gave the task of investigating them to the Area Director, who was himself a target of the charges. Stakes testified to the Special Committee that IHS leaders "have chosen to back off because it is their key managers that seem to have problems . . ., rather than some GS-5 clerk." [32]

RESPONSE TO THE SPECIAL COMMITTEE'S HEARING

Three months after the Special Committee's public hearing on Indian health, the Director of IHS acknowledged the agency's problems in a written statement: "We have gained a new awareness of administrative weaknesses that could make IHS vulnerable to waste, abuse, and fraud. . . . It is apparent that we have not adequately adjusted to the added oversight and administrative requirements of an agency-level organization, and have not been sufficiently responsive in resolving administrative problems." In that same statement the Director reiterated his belief that "the management of IHS is exemplary," but he also submitted a list of fourteen distinct "actions to search out and correct our management problems." [33]

Foremost among those fourteen steps was the creation of a Quality Management Initiative (QMI) to "strengthen the management and overall accountability of the IHS," an effort Dr. Rhoades named, "the Agency's number one priority for fiscal year 1990." IHS hired two independent management consulting firms to advise the QMI team. In the first draft of their "Strategic Overview," the consultants noted that IHS has "undeniable management problems," and is perceived by others at the Department of Health and Human Services (DHHS) as *"without question, the most poorly managed of all the agencies in DHHS."* (Emphasis in original.)[34]

The IHS Quality Management Initiative team's September 1989 report to the Assistant Secretary for Health summarized the consultants' findings:

> The Indian Health Service has serious management problems. It suffers from real operational deficiencies—such as the lack of critical management information and effective direction. It also suffers from an almost universal perception that it is managerially inept, that it believes it need not follow the rules, and that it denies it has serious management problems. The management weaknesses that have caused the agency's problems must be corrected.[35]

CONCLUSION

When Lewis Meriam and his team of investigators released their report on Indian administration in 1928, they declared that the "promotion of health and the relief of the sick are functions of such extreme importance that they always merit first consideration. . . . But taken as a whole practically every activity undertaken by the national government for the promotion of the health of the Indians is below a reasonable standard of efficiency."[36]

Unfortunately, those words still ring true today. As Dr. Rhoades himself noted following the Special Committee's hearing, "The Indian Health Service serves too great a mission to have it sidetracked by problems in our management of administrative functions."[37] Yet despite the pressing health needs of the Indian people and a shortage of resources to address those needs, IHS senior executives have repeatedly broken federal laws and regulations to engage in a pattern of inappropriate expenditures. Moreover, when evidence of that mismanagement was first exposed by IHS internally, top administrators ignored the problem. Sadly, the agency's managerial failings were not recognized until the spotlight was placed on the Indian Health Service by the Special Committee.

ENDNOTES

THE INDIAN HEALTH SERVICE

[1] *Chart Series Book*, Indian Health Service, Public Health Service, Department of Health and Human Services, Apr. 1988 at p. 1.

[2] Lewis Meriam *et al*, *The Problem of Indian Administration* (Baltimore: The Johns Hopkins Press, 1928) at p. 3; Dr. Everett R. Rhoades, Director, Indian Health Service, Public Health Service, Department of Health and Human Services, Prepared Statement, Hearings, Part 8, May 15, 1989 at pp. 180–83, 189; Dr. Denise Dougherty, Senior Analyst, Office of Technology Assessment, U.S. Congress, Testimony, Prepared Statement, Hearings, Part 8, May 15, 1989 at p. 57.

[3] Dougherty at pp. 12, 24; Rhoades Testimony, Deposition, May 5, 1989 at p. 81; Rhoades press conference, May 15, 1989. *See also* Marybeth Burke, "Budgets Have Forced Medical Care Rationing," *U.S. Medicine*, June 1988 at p. 2.

[4] In fact, that figure is probably a gross understatement because many Indians have been deferred repeatedly and have become discouraged from making further requests for non-emergency care. Dougherty at pp. 11–12; Dougherty Prepared Statement at p. 73.

[5] Memorandum, Deanna P. Walker, Health Systems Specialist, to Charles D. Plumage, Service Unit Director, Indian Hospital (Fort Belknap, Harlem, Montana), May 11, 1989, as cited in Georgia Perez Testimony, Exhibits, Hearings, Part 8, May 15, 1989 at pp. 157–59.

[6] There are between 350 and 600 Indian physicians in the United States, at least 93 percent of whom practice outside of IHS. Interview Memorandum, Executive Director of the Association of American Indian Physicians, Aug. 24, 1989; "Budgets Have Forced Medical Care Rationing" at p. 26; Dougherty Prepared Statement at pp. 69, 73.

[7] Dr. Bruce Nicholson Testimony, Prepared Statement, Hearings, Part 8, May 15, 1989 at pp. 91–92.

[8] The four Area Offices are located in Aberdeen, South Dakota, Albuquerque, New Mexico, Bemidji, Minnesota, and Oklahoma City, Oklahoma. Larry D. Morey, Assistant Inspector General for Investigations, Office of the Inspector General, Department of Health and Human Services, Testimony, Hearings, Part 8, May 15, 1989 at pp. 31–36; Briefing Paper, Inspector Linda Little, Criminal Investigations Division, Office of the Inspector General, Department of Health and Human Services, June 2, 1989 at p. 2.

[9] Morey at p. 32; Rhoades Deposition at pp. 68–70; Rhoades Prepared Statement of Aug. 22, 1989, Hearings, Part 8, May 15, 1989 at p. 166.

[10] The Director of IHS, on the other hand, testified that the Inspector General is "inspecting us all the time. . . . The standard

cliche in Indian communities some years ago was that the way you could tell an Indian family was a Navajo woman and her child in a hogan with an anthropologist and a tape recorder. That's now been replaced by the Inspector General. I mean, we are investigated continually. It interferes with our work, notwithstanding the importance of it, notwithstanding the value of it." Rhoades Deposition at p. 78. *See also,* Briefing Paper, Inspector Linda Little at pp. 2-3; Morey at p. 33.

[11] After obtaining a legal opinion from the DHHS Office of the General Counsel, IHS distributed Guidelines for Health Promotion/Disease Prevention Activities which stated: "It is *never* appropriate to use a Memorandum of Agreement for the purchase of goods or services from non-federal sources (unless specifically authorized in a statute)." (Emphasis in original.) Guidelines, July 26, 1989 at p. 6.

[12] Even if the Memoranda of Agreement had been legal instruments, IHS Area Directors lack the authority to sign them. Such authority is reserved to highly trained and certified contracting officers, but the Principal Contract, Grants and Procurement Management Officer in Albuquerque was not even aware of the existence of the Memoranda of Agreement signed by Waconda and Ray. Hearings, Part 8, May 15, 1989 at p. 34. *See also,* Albuquerque Memoranda of Agreement file; Robert W. Stakes, Director, Office of Program Integrity and Ethics, Office of Administration and Management, Indian Health Service, Testimony, Deposition, May 6, 1989 at pp. 97-98.

[13] This matter is still under investigation by the Inspector General. Memorandum on Report of Investigation of Possible Fiscal Exception at the Albuquerque Area Office, Director, Division of Fiscal Services, HRSA to Associate Director, Office of Administration and Management, Indian Health Service, Mar. 14, 1989 at pp. 9-14.

[14] Memorandum of Agreement between United States Public Health Service and Health Net New Mexico, Mar. 3, 1988 at p. 1.

[15] Rhoades Deposition at pp. 47-48; Memorandum of Agreement, Mar. 3, 1988 at p. 1; Russell D. "Bud" Mason, Chief, Alcohol/Substance Abuse Programs Branch, Office of Health Programs, Indian Health Service, Testimony, Deposition, May 3, 1989 at pp. 17-24; W. Craig Vanderwagen, Director, Division of Clinical and Preventive Services, Office of Health Programs, Indian Health Service, Testimony, Deposition, May 5, 1989 at p. 13; Stakes Deposition, May 6 at pp. 74-75; "Wellness . . . A Plan for Life," Indian Health Service Fitness Retreat, Color Dub Videotape, Summer 1988, 24½ minutes.

[16] Rhoades Prepared Statement of Aug 22, Exhibit 4 at pp. 221-27; Mason Deposition at pp. 17-23.

[17] Id. at p. 35; "Fitness Retreat Schedule," *Sunrise Springs: Health Care Programs and The Fitness Connection* at pp. 1-2.

[18] "The alpha chamber is a sensory deprivation apparatus which facilitates meditation." Rhoades Prepared Statement of Aug. 22, Exhibit 4 at p. 227. *See also,* Sunrise Springs Fitness Retreat budget documents.

[19] The Memorandum of Agreement authorizing this retreat was further marred by a blatant conflict of interest. IHS Area Director Waconda signed on behalf of the federal agency, and Bruce Leon-

ard, an IHS employee temporarily detailed to Health Net New Mexico, signed as the contractor. Memorandum of Agreement, Mar. 3, 1988 at p. 3. *See also*, Vanderwagen Deposition at pp. 10–11; note 12 *supra*.

[20] Rhoades press conference, May 15, 1989; Bill McAllister, "Hill Panel Halts Hearing On Indian Health Agency," *Washington Post*, May 16, 1989 at p. A4; Diane Duston, "Panel Says Indian Health Service Tried to Stymie Probe," *Associated Press* wire, May 15, 1989; Anne Q. Hoy, "Indian unit funding for retreat probed," *The Arizona Republic*, May 21, 1989 at pp. A1, A12.

[21] During Allery's four-year tenure as Area Director, the Bemidji Area Office's travel budget more than doubled, from $442,650 to $924,028. Management Implication Report, Special Agent Karen Sweet to Assistant Inspector General for Investigations Larry Morey, Feb. 14, 1989 at p. 2; Morey at pp. 31–32; Interview, Linda Little, Office of Investigations, Office of the Inspector General, Department of Health and Human Services, Sept. 26, 1989.

[22] Management Implication Report; Morey at pp. 31–33.

[23] Id. at pp. 32–33; Management Implication Report at p. 3; Travel orders for Nov. 15–18, 1988, Bemidji Area Office.

[24] Memorandum on Report of Investigation of Possible Violation of Government Travel Regulations, Director, Division of Fiscal Services, HRSA to Director, Indian Health Service, Sept. 21, 1989, Exhibits G, J and K; Management Implication Report at p. 3.

[25] Rhoades Prepared Statement of Aug. 22 at p. 166.

[26] Vol. 54, no. 17, Federal Register 4086, Friday, Jan. 27, 1989; Stakes Testimony, Deposition, May 3, 1989 at pp. 1–3.

[27] Stakes Deposition, May 6 at pp. 28–33, 47; Management Implication Report at pp. 3–4; Memorandum, Robert W. Stakes, Director, Office of Program Integrity and Ethics to Robert Singyke, Deputy Director, IHS, re: Bemidji Administrative Review, Oct. 6, 1988 at pp. 1–10.

[28] Stakes Deposition, May 6 at pp. 78–79; Memorandum, Robert W. Stakes, Director, Office of Program Integrity and Ethics, to Howard Roach, Associate Director, Office of Administration and Management, IHS, re: Albuquerque Area Administrative Review, Nov. 4, 1988 at pp. 1–15.

[29] Rhoades Deposition at pp. 43–45. Stakes Deposition, May 6 at p. 99.

[30] Rhoades Prepared Statement of May 15 at p. 187; Stakes Deposition, May 6 at pp. 106–09; Stakes Deposition, May 3 at pp. 20–21.

[31] Stakes Deposition, May 6 at p. 114.

[32] Id. at pp. 31–33, 37–39, 99–106, 110–11.

[33] Rhoades Prepared Statement of Aug. 22 at pp. 163–66.

[34] The draft version of the "Summary of Interviews" cited in the text was transmitted by facsimile from Scanlon & Hastings to IHS Headquarters on August 16, 1989. When the bound version of the firms' *Strategic Overview* was printed thirteen days later, the quote had been altered to read: ". . . *without question, IHS must strengthen its management if it is to continue to deliver quality health services in a period of growing demand and constrained resources.*" (Emphasis in original.) Indian Health Service Quality Management Initiative, Aug. 29, 1989 at p. 31. For the original draft, *see* Indian Health Service Quality Management Initiative:

Strategic Overview—Draft, Logistics Management Institute and Scanlon & Hastings at p. 25. *See also,* A Report to the Assistant Secretary for Health on "A Plan for Quality Management in the Indian Health Service," Sept. 18, 1989 at p. 1; Letter, Rhoades to Wilford J. Forbush, Deputy Assistant Secretary for Health Operations, Department of Health and Human Services, July 1989.

[35] Again, the draft version submitted to IHS by the two management consulting firms was weakened. The original version read as follows, with emphasis added to mark the words eventually deleted:

> The Indian Health Service has serious management problems *that affect its provision of health care.* It suffers from real operational deficiencies—such as the lack of critical management information and effective management direction. It also suffers from an almost universal perception that it is managerially inept, *perhaps even corrupt,* and that it *arrogantly* believes it need not follow the rules. The management weaknesses that have caused the agency's problems must be corrected. *Underlying those problems is an agency-wide lack of management leadership.*

Facsimile transmittal, Logistics Management Institute to IHS Headquarters, Sept. 14, 1989. For the weakened version, *see* A Report to the Assistant Secretary for Health on "A Plan for Quality Management in the Indian Health Service," Sept. 18, 1989 at p. 1.

[36] Meriam *et al* at pp. 121, 189.

[37] Memorandum, Dr. Rhoades, Director, IHS to Larry Morey, Assistant Inspector General for Investigations, June 28, 1989 at p. 1.

CHAPTER 5

INDIAN HOUSING

According to the Bureau of Indian Affairs, Indian country currently suffers from a 62,000-unit housing shortage. Moreover, many Indian families are forced to live in houses that are substandard, and in some cases virtually uninhabitable. The Census Bureau has reported that 16 percent of all reservation homes lack electric lighting and 21 percent have no indoor toilets.[1]

At a Special Committee hearing Senator Daschle recalled one night he spent with an Indian family:

> In South Dakota the wind chill in the wintertime gets to be 75 below zero . . . . I stayed in [a house on the Pine Ridge Reservation], and there was a four-inch gap between the wall and the ceiling at the top. The braces underneath the floor, instead of being 18 inches were 36 inches apart, so the floor swayed.
>
> There was one electrical unit in the whole house that worked, and they had extension cords going from every room to that one wall unit. And there was this great big collection of extension plugs that went into one unit so they could get all the cords in there . . . .
>
> They showed me where the heater units on the side were installed, but then they took me underneath the floor, and all the cords for those heater units were just dangling . . . . They weren't hooked up to anything. They were just there for looks.[2]

Senator Daschle's story is far from unique on American Indian reservations today. To combat similar problems half a century ago, Congress passed the United States Housing Act of 1937, authorizing loans to local housing authorities for public or low rent housing. The Interior Solicitor declared tribes eligible for this program, but it was not until 1961—more than two decades later—that the federal Department of Housing and Urban Development (HUD) permitted tribes to participate. And it was not until 1976 that HUD published its first guidelines on Indian housing. Under those regulations, HUD allocates funds to 180 tribally-run Indian housing authorities (IHA's), who then have primary responsibility for designing, contracting, developing and managing the housing units. HUD develops policies and regulations, oversees six regional Indian field offices, and gives technical assistance to the IHA's, as necessary, all with the goal of providing safe, decent and sanitary Indian housing at the lowest possible cost.[3]

In recent years accomplishing this goal has become more difficult, as annual funding for Indian housing has decreased to less than three percent of the total estimated need. While BIA estimates a 62,000-unit housing shortage, HUD's fiscal year 1989 allocation for new reservation housing covered only 1,243 units. With such an extreme shortage of resources to address Indian housing needs, efficient administration becomes particularly critical.[4]

Confusion in the Indian Housing Program

Unfortunately, Indian housing projects have become case studies in bureaucratic confusion and unaccountable government. The federal functions are divided between three agencies in three different Cabinet departments—BIA for roads, the Indian Health Service for water and sanitation facilities, and HUD for the houses themselves. In addition, HUD shares its responsibilities with Indian housing authorities which have authority to enter into contracts and control the day-to-day activities involved with constructing new homes.[5]

The federal government's relationship with tribal authorities frequently makes for an odd partnership. Sometimes the relationships between HUD and the tribal authorities are cozy, as when the Department approved one IHA's purchase of a computer, a photocopier, and a truck with power windows and locks, cassette player and mag wheels, as well as the remodelling of the IHA's office—all as part of HUD's financing of a housing project. Other times, their relationships are strained, as when HUD insisted, over the strongly stated objections of the IHA, on paying in full an architect who, according to the IHA, had been fired for breach of contract.[6]

But most often, confusion and duplication between the federal and tribal bureaucracies simply lead to wasted time and money. In fact, the Special Committee has found the greatest failures in the Indian housing program occur in areas where responsibility is divided between federal and tribal authorities—administering Indian preference in contracting, ensuring adequate architectural services, providing basic utilities to newly constructed units, and performing on-site inspections.

FRAUD IN INDIAN PREFERENCE CONTRACTING

Like the other federal agencies involved in Indian preference contracting, HUD has been vulnerable to fraud and abuse, making it a haven for phony Indian companies that successfully bid contracts away from legitimate Indian firms. While the market for Indian preference housing contracts has been captured by firms that are Indian in name only, HUD has never disqualified a single front company. As a result, much of the $125 million that HUD makes available each year for Indian contractors has actually been awarded to front companies posing as independently controlled, Indian-owned firms.[7]

Although HUD's own internal guidelines give it the authority to disqualify contractors that abuse the Indian preference contracting program, IHA's actually award the contracts, applying Indian preference at their own discretion. HUD therefore expects the IHA's—who lack the federal department's subpoena power and investigative authority—to ensure the selection of trustworthy, reputable firms. When questioned by the Special Committee, the Director of HUD's Office of Indian Housing explained, "We have relied on the Indian Housing Authorities to implement Indian preference, and we have not followed up as carefully as we should have." [8]

Given that a substantial portion of HUD's construction contracts are awarded to firms that dishonestly manipulate the government's program for Indian economic development, the need for stringent oversight is clear. When the contractors are not trustworthy, the contracting agencies—whether federal or tribal—must be particularly vigilant, not only in Indian preference, but across-the-board. Yet the confusion that dominates the HUD-IHA relationship is hardly conducive to adequate oversight.

FAULTY ARCHITECTURAL SERVICES

Among the other responsibilities shared by HUD and tribal authorities is the selection of capable contractors for housing projects. HUD's guidelines give IHA's the authority to select and enter into contracts with architects and engineers, but require HUD to ultimately approve the hiring of all architects and engineers, as well as all plans submitted by them. As in the case of Indian preference enforcement, this division of responsibility has left no one party accountable, and adequate quality control in the hiring of architects and engineers is virtually non-existent.[9]

The Office of Indian Housing is largely incapable of reviewing plans for the projects they fund, as only one of its six regional offices contains any professional architects or engineers. HUD therefore relies on IHA's to judge architects' qualifications, yet it has set no standards for the IHA's to perform this essential task. In numerous projects surveyed by the Special Committee, architects provided defective plans or services, and the IHA was forced to hire additional contractors to correct defects discovered during the design or construction.[10]

On one project at the Wind River Reservation in Wyoming, for example, the architect drafted defective designs—including a faulty drainage system that caused serious flooding—resulting in well over $100,000 in additional costs. To cover the fees for a new architect, money was taken from the paving budget and the project therefore has gravel roads. While the project was still in progress, an employee of the fired architect became a member of the IHA's executive board.[11]

After an architect originally selected by the IHA and HUD went bankrupt during the early stages of a project on the Navajo Reservation, two additional architects were hired and paid to finish 60 modular homes. For a project at Cheyenne River, in South Dakota, HUD approved architectural plans that contained "deficiencies" which, as noted by the HUD inspector for that development, caused "daily problems" in the construction work.[12]

LACK OF UTILITIES AT HOUSING SITES

Even the task of guaranteeing that constructed homes will have access to basic utilities such as water and electricity often gets bungled by bureaucratic confusion. HUD is required to obtain written assurances that utilities will be accessible prior to occupancy, but IHA's actually monitor the contractors' efforts to make utilities available to all units. Also, the Indian Health Service has the responsibility for overseeing the design and installation of proper sewer facilities on HUD Indian housing projects, and BIA reviews and approves legal descriptions of proposed housing sites, as well as any agreements which allow parties providing utilities the right to traverse reservation lands.[13]

In a number of projects reviewed by the Special Committee, the confusion surrounding these tasks has led to added and unnecessary costs. But worse, houses were sometimes built and occupied without electricity or water service.

For instance, on a 26-unit project on the Santa Ynez Reservation in California, HUD waited over eight months for the BIA to approve proposed utility plans and suggested easements. When BIA failed to respond, HUD went ahead with construction due to time constraints. Not suprisingly, electricity to the houses was ultimately delayed by easement problems. HUD responded to the delay by claiming that the IHA and contractor were responsible for coordinating access to electric power. On that same project, construction was more than 90 percent completed before the Indian Health Service complained to HUD that the water and sewer system installed by the contractor was unacceptable because it violated the Uniform Plumbing Code.[14]

In April of 1986 the architect's inspection reports to HUD noted that water service was not available to seven of thirteen units being built on the Ute Mountain Reservation in Colorado. Three months later, when the project was about to be completed, two units still lacked water service, one of which was eventually occupied after a portable toilet was installed.[15]

INADEQUATE ON-SITE INSPECTION

IHA's employ inspectors to oversee the construction of housing projects, but HUD guidelines require federal inspectors to provide periodic monitoring, too. However, HUD's on-site reviews of Indian housing projects are limited and inconsistent, as the federal office usually assumes that IHA's are providing the necessary day-to-day inspections. Because HUD has not established minimum standards for IHA inspectors, housing inspection is sometimes left to "inspectors" who lack minimal qualifications or expertise.[16]

For example, at the Navajo Reservation, a 150-unit development was reviewed more than 30 times by inspectors for both HUD and the Navajo IHA. At one point the HUD reviewer noted that construction was 35 percent complete. The following week, the IHA inspector declared the project only 25 percent complete and one month later, the same HUD reviewer stated it was 30 percent complete. Given such confusion, it is not surprising that less than seven months after the units were officially deemed ready for occupancy, the "completed" development had "severely deteriorated" streets, gutters and walkways, and leaky units which were built "out of place." [17]

THE COSTS OF CONFUSION: DELAYS AND OVERRUNS

Faulty architectural plans, poor site selection, and inadequate on-site inspections all contribute to lengthy delays in Indian housing projects. Often the length of time required to complete a project has less to do with its size than with the extent of bureaucratic mishap. The second project at Navajo mentioned above was more than ten years in the works. A housing project with only 22 units at the Lake Traverse Reservation in South Dakota faced "serious delays" due to, among other things, the hiring of a deficient contractor, and was not completed until 1986—seven years after HUD initially reserved funds for the project.[18]

The Director of HUD's program traces extended delays to the confusing, duplicative bureaucracies that administer Indian housing: "When a project does go wrong, for whatever reason, we seem to have a difficult time getting it back under control. . . . We get involved at the HUD level. The housing authority still has the main responsibility, but frequently HUD and the housing authority may have a disagreement on how to [proceed]. Sometimes [HUD] may even be an obstacle in the housing authority's completion of this project." [19]

These same delays typically lead to cost overruns as well. HUD approves these overruns by signing change orders that amend existing contracts. Such requests for additional funds are sometimes necessary, but should be rare.[20]

All too often, however, change orders result from problems that could have been avoided if HUD or the IHA had provided proper oversight. Change orders are often required to remedy simple problems with architectural plans. On one project at the Manchester Rancheria in California, for example, change orders were needed to correct engineering errors and relocate meters that were improperly installed due to unclear plans. A 47-unit project at Cheyenne River in South Dakota underwent 74 separate changes, several of them for services that could have been averted if the architect's plans were reviewed properly before being implemented. One of those change orders, however, was worse than unnecessary, as HUD, in an act of pure negligence, approved funds for corrections already made and paid for with a previous change order. Extra costs in a project at Turtle Mountain in North Dakota also forced HUD to drop the construction of eight units contemplated by the original contract.[21]

CONCLUSION

Interestingly, the critical functions for which HUD and IHA's share responsibility are the precise areas where the Special Committee found checks and balances to be the most deficient. In hiring competent architects, guaranteeing availability of basic utilities to new houses, conducting proper inspections during construction, and even enforcing Indian preference guidelines, neither HUD nor the IHA's assume full responsibility. Because of confusion as to whether federal or tribal authorities are responsible, neither party can be held entirely accountable for the failures we have uncovered.

In an environment where accountability is so elusive, each party blames the other for their failures. IHA's often fault HUD for pursuing a middle-of-the-road policy, failing to either provide them with adequate support or give them full autonomy. They fault HUD for continuing to use internal guidelines rather than agency regulations which are subject to public scrutiny, and believe that HUD's paternalistic attitude hinders the efficient construction of new housing.[22]

The current Director of HUD's Office of Indian Housing agrees, in part, but feels that IHA's should not escape sharing the blame: "There is quite a bit of ambiguity on who is responsible to do various items. We have tried to put into the hands of the housing authorities as much responsibility and authority as we can. Where we have been clear about what their responsibility and authority is, IHA's have had no problem. . . . In certain areas where we seem to go back and forth on who really must do something, . . . we have problems." [23]

As HUD and the IHA's "go back and forth," unnecessary costs are added to Indian housing construction projects. Scarce funds that could be used to build much-needed additional units are instead wasted. The only victims of this system—the American Indian men, women and children who are forced to live in substandard housing, or even go homeless—have no one who they can hold to account.

ENDNOTES

INDIAN HOUSING

[1] Consolidated Housing Inventory, Fiscal Year 1988, Form 5-6406, Bureau of Indian Affairs, Department of the Interior; We, the First Americans, Bureau of the Census, U.S. Department of Commerce, 1989 at pp. 13–14.

[2] Senator Thomas A. Daschle, Hearings, Part 11, June 8, 1989 at pp. 48–49.

[3] 42 U.S.C. § 1437 *et seq.*; Felix Cohen *et al*, *Felix S. Cohen's Handbook of Federal Indian Law*, 1982 ed. (Charlottesville, VA: Michie, 1982) at pp. 706–12; Dominic Nessi, Director, Office of Indian Housing, U.S. Department of Housing and Urban Development (HUD), Testimony, Prepared Statement, Hearings, Part 3, Feb. 27, 1989 at p. 671; U.S. Congress, Senate, Select Committee on Indian Affairs, *Amending the United States Housing Act of 1937 To Establish A Separate Program To Provide Housing Assistance For Indians and Alaska Natives*, 100th Cong., 2nd sess., May 13, 1988, S. Rep. No. 100-344 at pp. 1-3.

[4] Consolidated Housing Inventory; Nessi Testimony, Hearings, Part 11, June 8, 1989 at p. 44.

[5] "Interdepartmental Agreement On Indian Housing," 24 CFR Part 905, Subpart B, Appendix 1; 24 CFR 905.202; "Development Process Overview," HUD, undated.

[6] Letter, Executive Director, Housing Authority of the Kiowa Tribe of Indians, to Director, Indian Programs Division, HUD, Aug. 22, 1988; "Area Office Review Form," HUD, OK 98-6, Sept. 15, 1988; Letter, John Dibella, Director, Housing Development Division, Office of Indian Programs, HUD, to Earon T. Dahl, Executive Director, Ute Mountain Ute Housing Authority, Dec. 12, 1989; Letter, Dahl to Jack Windsor, Chief, Technical Services Branch, HUD, Dec. 17, 1985; Letter, Dibella to Dahl, Jan. 3, 1986; Letter, Dahl to Dibella, Jan. 13, 1986.

[7] *See* Part Three, Chapter 1 *supra* for findings of the Special Committee regarding Indian preference in contracting. In 1988 approximately $130 million was spent by HUD on the construction of new Indian housing units, of which about $125 million was available to be bid under Indian preference. However, in that same year HUD's budget authority for its Indian housing program, which includes rehabilitation of existing units, was over $200 million. Nessi, Interview, Oct. 17, 1989; Federal Funding of Indian Programs, Office of Management and Budget, June 13, 1989.

[8] 24 CFR 905.204; Nessi, Feb. 27 at p. 277.

[9] "Program Participants and Departmental Staff, Interim Indian Housing," Handbook 7440.1 (HUD Indian Housing Handbook) at sections 3-2(a), 7-2(a), 7-2(b). *See also* 24 CFR 905.211(b).

[10] HUD's Indian program is administered by six Offices of Indian Programs located in Chicago, Oklahoma City, Phoenix, Denver, Seattle, and Anchorage. HUD's main office in Washington, D.C. includes a staff of 12 who deal exclusively with Indian programs. Nessi, June 8 at pp. 37, 39, 42; Leon Jacobs, Director, Office of Indian Programs (Chicago), HUD, Interview, Sept. 19, 1989.

[11] Letter, John V. Myers, Director, Office of Indian Housing, HUD, to Roger W. Kipp, Thomas Hodne/Roger Kipp Architects/Planners, June 11, 1986; Letter, John Dibella, Director, Housing Development Division, Office of Indian Programs, HUD, to Lucille McAdams, Executive Director, Wind River Housing Authority, Jan. 17, 1986; Change Orders G-1 to G-9, WY 1-15; Office Memorandum, Arapahoe Housing Authority Members to Arapahoe Business Council, Apr. 12, 1983.

[12] Letter, Bruce Knott, Production Manager, HUD, to John Chapela, Executive Director, Navajo Housing Authority, Mar. 9, 1987; Letter, Chapela to Knott, Mar. 17, 1987; "HUD Representative's Trip Report," SD 5-17, June 12, 1987 and Nov. 24, 1987.

[13] HUD inspectors must further be satisfied that, on the final inspection of a project, "all facilities and utilities essential to occupancy are provided." HUD Indian Housing Handbook, sections 3-3(a), 3-3(b), 3-3(f), 3-3(g), 3-3(h), 7-14(b)(2); 24 CFR 905.216-905.217.

[14] Response, HUD to Special Committee chart, undated; Letter, Gene Bigelow to Greg Mize, Vice President, The Antique Manner, Apr. 4, 1988; "HUD Representative's Trip Report," CA 80-24, 26, 45A, Oct. 21, 1988; Letter, Terry L. Whitington, District Engineer, IHS, to Gene Bigelow, Development Officer, All Mission Indian Housing Authority, Mar. 17, 1988; "Low Rent Project Construction Report," CA 80-26, HUD, Feb. 29, 1988.

[15] "HUD Representative's Trip Report," CO 47-5, July 28, 1988; Reports, Brookie Architecture and Planning, Apr. 29-30, 1986.

[16] HUD inspectors must be satisfied that, on the final inspection of a project, "the work has been installed in compliance with the contract requirements, [and] that all facilities and utilities essential to occupancy are provided." HUD inspectors are also charged with carefully examining the "adequacy and quality" of the IHA project inspection staff. HUD Indian Housing Handbook sections 7-2, 7-10(a), 7-10(d), 7-14(b)(2). *See also* 24 CFR 905.221; Nessi, June 8 at pp. 39-40.

[17] "HUD Representative's Trip Report," AZ 12-57, Oct. 23, 1985 and Dec. 4, 1985; "Low Rent Public Housing Construction Report," AZ 12-57, Navajo Housing Authority, Oct. 31, 1985; Letter, Bruce A. Knott, Production Manager, to John A. Chapela, Executive Director, Navajo Housing Authority, Nov. 4, 1986; "OIP Representative Trip Report," AZ 12-57, HUD, July 22, 1987; Letter, Navajo Housing Authority to Ralphael Mechem, Director, Region IX, Office of Indian Programs, HUD, Oct. 2, 1987; Letter, Fred Thompson, Jr., Executive Director, Navajo Housing Authority, to Bruce Knott, Production Manager, HUD, undated.

[18] Letter, Robert Vasquez, Assistant Regional Administrator, HUD, to Richard Johnson, Executive Director, Navajo Housing Authority, Aug. 3, 1977; "Notice of Date of Full Availability," AZ 12-57, HUD, approved Sept. 25, 1987; Letter, William Hallett, Director, Office of Indian Programs, HUD to Daryl E. Hormann, Execu-

tive Director, Sisseton-Wahpeton Housing Authority, May 8, 1979; Letter, John Dibella to Ron Jones, Executive Director, Sisseton-Wahpeton Housing Authority, July 7, 1988.

[19] Nessi, June 8 at p. 41.

[20] In fact, any delays in housing projects, at a minimum, lead to extra costs due to inflation. Although the situation is currently improved, a 1984 audit by the HUD Office of the Inspector General estimated that funds that could provide over 600 Indian housing units were being lost annually by HUD due to project delays. "Report On Audit Of The Development And Management Of Indian Housing," Office of the Inspector General, HUD, 86-TS-101-0018, June 19, 1986 at pp. 1-2; HUD Indian Housing Handbook at section 7-11.

[21] Letter, Darlene Tooley, Executive Director, Northern Circle Indian Housing Authority, to Randy Willard, IHS, May 25, 1988; Letter and enclosure, Darlene Tooley to Frank Schierenbeck, Office of Indian Programs, HUD, June 9, 1988: "HUD Representative's Trip Report," SD 5-17, Nov. 24, 1987; Change Order G-8, SD 5-17; Letter, Glen Barber, President, R & S Construction Company, to Terry Pearman, Cheyenne River Housing Authority, Aug. 8, 1987; Change Order G-11, SD 5-17; Letter, Jim Bier, R & S Construction Company to Terry Pearman, June 18, 1987; Letter, John Dibella, Director, Housing Development Division, Office of Indian Programs, HUD, to Albert Wilkie, Executive Director, Turtle Mountain Housing Authority, Sept. 22, 1986; Letter, Daniel Killeen, Archambault & Company, to Albert Wilkie, Jan. 31, 1986; Letter, Charles E. Archambault, Archambault & Company, to Albert Wilkie, Aug. 6, 1986.

[22] Resolution, New Mexico Indian Housing Authorities Association, Resolution #3, #10, Feb. 21, 1989; Nessi, June 8 at p. 43.

[23] Id. at p. 42.

CHAPTER 6

CORRUPTION AMONG TRIBAL GOVERNMENTAL OFFICIALS

American Indian tribal governments occupy a unique place in the federal system. Compared to state and local governments, their present form is relatively recent. However, the existence of Indian tribal governance predates by centuries the Constitution itself. Yet it was only within the last two decades that these governments have acquired the power and recognition approaching that held in 1789. As with any other recently emerging government or indeed country, newly-found power affords opportunity for its abuse. At the same time, checks and balances to thwart individual corrupt officials have not had the same opportunity to develop. This pattern of new governments—and countries—suffering endemic corruption is nearly universal and should not be viewed as in any sense peculiar to the Native American experience. Yet that universal historical fact can in no way mitigate the necessary attack against corruption. In fact, it only increases its urgency. While Indian citizens often live in poverty, bereft of the economic opportunities available to other Americans, they have fallen prey to the actions of certain corrupt officials. American Indians cannot afford corruption. Tribal governments, as well as the federal system in which they operate, must not spare any effort or expense to root out corruption, no matter where it is found.[1]

PETER MACDONALD AND THE NAVAJO NATION

The largest American Indian tribe in the United States is the Navajo Nation. The Navajo Nation comprises some 200,000 individuals, over a fifth of all reservation Indians in the country, while its land mass is larger than West Virginia and eight other states. The annual budget of the Navajos' tribal government and its natural resource base dwarf those of other tribes. The

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importance of the Navajo Nation among American Indians makes even more tragic the corruption found by the Committee.[2]

The leading Navajo politician of the modern era is Peter MacDonald. Born Hashkesilth Begay in 1928 on the Navajo Reservation, MacDonald graduated from the University of Oklahoma and became an engineer with Hughes Aircraft in 1957. Returning to the reservation in 1963 to work for the tribe, in 1965 he headed the Navajo Office of Economic Opportunity. In 1970 Peter MacDonald was elected Tribal Chairman, the Chief Executive Officer and highest official of the Navajo government. He served three four-year terms until 1983, throughout the era when tribal governments were transformed into modern, full-fledged governments supported by extensive federal funds. While MacDonald lost a reelection bid in 1982, he helped usher in the new era of tribal government to the Navajo people.[3]

THE 1986 CAMPAIGN

In early 1986 MacDonald faced the prospect of the Navajo Chairman's election in November. He turned to his close friend Byron T. "Bud" Brown for help. A non-Navajo, Brown had directed the Navajo Agricultural Products Industry Commission during MacDonald's last term. Since the 1982 election MacDonald and Brown, an intermittent entrepreneur and two-time congressional candidate, made numerous attempts to profit from business deals, all to no avail.[4]

MacDonald's sights were set high: the Governorship of Arizona, or perhaps Congress. But Brown advised and MacDonald agreed that MacDonald stood a greater chance for reelection as the Navajo Tribal Chairman once again.[5]

To help with the reelection effort, MacDonald and Brown established the Peter MacDonald Foundation, ostensibly charitable in purpose, to provide MacDonald with a renewed political profile to the non-Navajo world—and money. Yet, like all of MacDonald and Brown's previous business deals, the foundation failed to make a profit. MacDonald had to turn to others for the funds.[6]

There was a cadre of non-Navajo contractors and businessmen active under MacDonald's previous administration and largely shut out under then-Navajo Chairman Peterson Zah. According to Navajo tribal law, it was illegal to accept campaign contributions from non-Navajos. Nonetheless, MacDonald sought them out for funds, gifts and services—with the hope for future business clearly in sight.[7]

MacDonald's quest for cash, whether for the campaign or his own personal lifestyle, was so great that he borrowed $70,000 on a short-term, unsecured note from the United New Mexico Bank in Gallup, New Mexico. On his loan application MacDonald falsely stated that the funds were for his son's purchase of a home in California. But he guaranteed the bank that he could repay the loan once he became tribal Chairman again, a representation the bank readily accepted.[8]

Of course, the bank did not know how true their belief really was. For not only were MacDonald's sights set high; Brown, too, saw his fortune tied to the erstwhile Navajo leader. Together, they discussed a plan whereby Brown would act as broker for future businesses locating on the Navajo Reservation, assuring that in each instance the new Chairman would take a secret cut.[9]

MACDONALD'S ELECTION AND THE BIRTH OF "BIG BO"

On November 4, 1986, Peter MacDonald was again elected Chairman of the Navajo Tribal Council, Chief Executive of the largest Indian tribe of North America. No sooner were the ballots counted than MacDonald asked Brown for a celebratory vacation for the entire family in the Caribbean. Brown, without resources (he even charged his own personal expenses to the "charitable" Peter MacDonald Foundation), had to borrow the most he could from a bank: $20,000. Even at that, he feared that a Caribbean vacation could drive him further into debt. After all, the promise of future Navajo rewards was still just that, a promise. Brown's friend Tom Tracy, a wealthy Phoenix businessman, knew of a house in Hawaii that could be used at no charge. So Brown proposed Hawaii and the Chairman-elect, his wife Wanda and daughter Hope accepted the Pacific alternative. Brown paid for all the costs: airfare, rental car, golf fees, lavish meals, and the hotels on an extended inter-island hop, almost $10,000 in total.[10]

Yet such an expense could not be justified for a frolic alone: this was a working vacation. Potential suitors played court on the 9th Tee of the WaiKoloa Golf Club. Chief among them was Wayne James, Tom Tracy's accountant and general troubleshooter, accompanied by a representative of the Maverick Beef Company. Their plan was to locate a foundation herd of Solaire Maverick cattle—a special breed that produces a leaner "natural light" beef—on the Navajo Reservation, with extended range. The underlying scheme, however, was that the Chairman-elect and Brown would purchase Maverick stock at an insider price before the public announcement of the deal with the Navajos and quickly unload the stock at a big profit once it was publicly announced that the fledgling Maverick company entered into a major contract with the largest tribe in North America. The problem with the plan was that Maverick wanted a significant long-term business commitment from the tribe; MacDonald and Brown wanted a fast profit.[11]

The Maverick scheme, nonetheless, did not prove completely fruitless. It occurred to Brown, who had sometimes dabbled unsuccessfully in real estate, that the cattle could come with additional land to graze—and additional profit to him and MacDonald.[12]

For years, the Big Boquillas Ranch near Seligman, Arizona, in the northwest corner of the state, was for sale. Tenneco, the owner of the land, had been desperate since the early 1980's to unload the more than 491,000 acres. The market was declining and whatever value the land had was in its vastness; otherwise it was mostly semi-arid desert without any proven mineral resources of worth. In 1984 Tenneco publicly advertised the land in the *Wall Street Journal* for $25 million, or about $50 an acre. By the end of 1986, Tenneco had three possible buyers, all in the range of $18 to $25 million. Despite agreeing to various purchase options, Tenneco was unable to consummate any deal. Tenneco officials admitted that they would have been pleased to sell the entire property for $18 million in cash.[13]

Playing golf together in Hawaii, Brown mentioned the "Big Bo" Ranch. He knew of MacDonald's interest in land (and money): How would the Navajo Nation like to purchase this vast space? The Chairman-elect instructed Brown to find out the terms. But MacDonald needed money now.[14]

Fresh from Hawaii, MacDonald and his wife Wanda traveled with John Paddock on an all-expense paid mini-vacation to Caesar's Palace in Las Vegas. Paddock was a major Arizona construction contractor who had been active on the reservation during MacDonald's previous regime. In fact, Paddock had already given MacDonald free use of his plane and other gifts during the campaign. Now, MacDonald asked John Paddock for $35,000 in cash. A $35,000 further investment for future business seemed in order, but Paddock insisted on a note. Loaning the money also seemed a prudent protection, though Paddock soon came to realize that a "loan" for MacDonald and his aides existed solely on paper. Paddock's loan was never repaid *per se:* only in business contracts with the Navajo government.[15] And MacDonald and his associates continued throughout his term in office to willingly use "loans" to mask their extortionate demands, if it appeared to make the payor feel any better.[16]

Meanwhile, the Big Bo Ranch was under one of its many failed options. In the beginning of January, Brown met with Mel Jans of Tenneco. Jans informed Brown of Tenneco's $25 million asking price and the other terms of purchase, with a commission to Brown of $750,000 for brokering the deal.[17]

Brown hurried back to Window Rock, Arizona, capital of the Navajo Nation, where MacDonald was awaiting his inauguration on January 13, 1987. Brown and MacDonald discussed the real terms of the transaction: Brown would enter a secret partnership to buy the ranch with Tom Tracy, who had the financial statements to be considered a *bona fide* purchaser, while Tracy forming a dummy corporation would be represented as the only true purchaser. Tracy's dummy company would buy the ranch, mark up the price and then sell it in a quick sale or "land flip" to the Navajos for a substantial profit. MacDonald smiled, "I assume I'll be taken care of." No specific terms of payment were discussed since a final profit for the three conspirators had not been fixed, but it was agreed that MacDonald certainly would be fully paid. For his part, MacDonald assured Brown that he would push the transaction through the Navajo bureaucracy. Always making sure to keep his own hand invisible, MacDonald instructed Brown on all the necessary steps to take.[18]

Brown booked a room at the Gallup Holiday Inn near Window Rock until the Inaugural—after all, he provided (free of charge) MacDonald's limousine that would head the parade. And within days the next he heard from the Chairman-elect was whether the Big Bo deal was proceeding as planned. There was nothing new in such a short time, but MacDonald had a "request." He needed $25,000 immediately because the United New Mexico Bank wanted repayment on the loan. MacDonald also asked Brown for a brand-new BMW. Nothing but the best, MacDonald instructed Brown: a grey or black, four-door sedan, top-of-the-line, Model 735i, L-4 series worth more than $55,000, with all the extras including air-conditioning, stereo, leather upholstery and radar detector.[19]

Brown turned to Tracy. He promised Tracy that MacDonald would push the flip-sale of the Big Bo Ranch through the Navajo government, but in return wanted a share of the profits. Although he had arrived at no specific agreement with MacDonald, Brown told Tracy that MacDonald insisted that the profits be split three ways: one-third MacDonald, one-third Brown, and one-third Tracy. Tracy, even though he was the one putting up all the initial money, agreed. After all, Brown was entitled to one-third by bringing MacDonald, and MacDonald in turn was due another third for bringing the unquestioning purchaser who would enrich them all. Risking $100,000 for an option was worth the almost certain millions in profits to Tracy. And Brown also told Tracy that MacDonald required $25,000 up front for his loan at the United New Mexico Bank, and a new BMW to demonstrate their further good faith to the incoming Chairman.[20]

Tracy did not hesitate, provided MacDonald got all of the $25,000 and Tracy could make sure MacDonald knew it came from Tracy. Distrust ran high between Tracy and Brown and their various deals through the years had only assured each of them of the other's overriding dishonesty. Tracy decided to wire transfer the funds directly to MacDonald's bank account.[21]

Brown told MacDonald of the impending wire transfer. MacDonald, who by now was the duly inaugurated Chairman, then authorized Vice President Lonnie Hamilton of the United New Mexico Bank to arrange for the wire transfer to pay down his note. Brown went to meet

Hamilton to obtain the account details and confirm the transfer. And Tracy subsequently called Hamilton to check Brown's description of MacDonald's account information. Four days after Tracy sent his letter of sale to the Navajo Nation and the Big Bo deal was proceeding as planned, he wired the $25,000 to Peter MacDonald's account at the United New Mexico Bank. The payoff was simply entered in Tracy's books as a tax-deductible business expense of the Big Boquillas transaction.[22]

In the meantime, Brown searched for MacDonald's BMW. Tracy agreed to help again and sent Wayne James with Brown to lease the car. Camelback Porsche/Audi/BMW in Phoenix had the best deal: everything the Chairman specified, except it was a 1986 model, not a 1987. MacDonald signed the lease agreement, Tracy made the $3,000 downpayment and the BMW was delivered to the Chairman's house in Flagstaff. MacDonald did not object to the lease, provided Brown made the payments, and in the coming months MacDonald called Brown to regularly remind him of the monthly $813 installments. The Chairman did object to one thing, though. He did not like the car, he told Brown; it was a 1986 model and he wanted a 1987.[23]

Tracy's letter to the Navajo Nation had set a sale price of $33.4 million. Since Brown and Tracy had finally decided on a markup of over $7 million, in early March, 1987, Brown and the Chairman met at Window Rock to set MacDonald's precise share of the profits, too.[24]

Brown was in a quandary. If he did not promise MacDonald one-third, MacDonald might find out from Tracy. And if he agreed to give MacDonald one-third, he would get less than what he had been expecting out of the deal. He decided to be truthful to MacDonald, in a fashion: MacDonald would get one-third of the profits but since, Brown said, Tracy owed him $850,000 from a prior business deal, MacDonald's third would be less the $850,000, and net of taxes. MacDonald agreed. He was hardly in a favorable negotiating position to argue over paying taxes on bribes. But as soon as the Navajos made the first downpayment on the Ranch (MacDonald had instructed Brown in every step to follow with the Navajo bureaucracy, while Brown met little resistance) and Brown received his first $50,000, MacDonald asked for $5,000 in cash. Brown deposited the $50,000 and wrote a check to cash, handing MacDonald an envelope of fifty $100 bills in early June, 1987.[25]

MACDONALD'S OFFICIAL PROGRAM

At his Inaugural, MacDonald assumed office with a grandiose plan of economic development and Navajo rejuvenation. As the leading Indian politician in the country, his Nation would be a "magnet for free enterprise," achieving full sovereignty by economic self-sufficiency and growth. And as Chairman, Peter MacDonald would be the bright star to attract the country's powerful politicians and largest corporations to the Navajo Reservation. It would be nothing less than "a new spring." [26]

To meet the powerful, MacDonald designed a complete renovation of the tribal government offices, with his executive suite as the crowning capstone. Solid mahogany paneling, gold-plated toilet fixtures and tile with turquoise inlay—nothing was too trivial. At the same time, the work rewarded the faithful: John Paddock was named construction manager, Pat Chee Miller general contractor and Johnny Donaldson mechanical subcontractor on the more than $600,000 project.[27]

The office was not alone. While MacDonald had a house in Flagstaff, he sought another home at Window Rock. He turned to Larry Ward, the tribe's insurance broker during MacDonald's previous administration, who owned a small house and land in St. Michaels, adjacent to Window Rock. Ward agreed to lease it to MacDonald for a minimal rent. But MacDonald insisted vast improvements be made to convert Ward's house into a luxury home: master bedroom suite, deck with jacuzzi tub, exercise room, wet bar, expanded living room with new fireplaces and French doors. The house doubled in size and value. Ward subsequently brokered the insurance contract for the Navajo Nation at an annual fee of $100,000.[28]

To make the improvements, Ward asked Johnny Donaldson, his friend and a local non-Navajo contractor. Donaldson agreed to make the improvements, if he could purchase the property after MacDonald's administration without the added value of the renovation and if Ward would help him get contracts from the Navajo Nation in return. Through MacDonald's auspices, Ward did in fact get Donaldson special treatment and tribal contracts. However, the pressure grew from MacDonald directly to Donaldson for even more improvements, while MacDonald's aides at the same time held out the promise of additional tribal contracts.[29]

Along with a refurbished office and a renovated capital home, the Chairman wanted private jets to fly him wherever he wished to go. He had already accumulated over $60,000 in free travel using Paddock's plane on call and now he sought to have the tribe purchase its own jets. American West Aircraft in Houston agreed to provide the Navajo Nation with demonstration flights, to be credited to the purchase price if the planes were bought and to be paid at an agreed upon charter rate if the tribal government decided not to purchase them. Instead, MacDonald flew himself and his family on a series of flights to Boston, centering around his daughter's commencement. Since MacDonald refused American West's offers to pay for some of the legs by first-class commercial carrier, MacDonald ran up in excess of $50,000 in charter fees—all expenses that the Navajo government eventually paid on MacDonald's behalf. Indeed, no matter how personal the purpose, whether a daughter's graduation or simply to take the entire family to Miami over New Year's for the Orange Bowl, the Navajo Nation treasury paid the private luxury freight.[30]

And Peter MacDonald scoffed at any critics, venturing that they were simply "jealous," for his government had "more resources than Exxon." MacDonald's justification when questioned on the $18,000 airline cost for the Orange Bowl trip was, "What do you want me to do, hitch-hike?"[31]

Planes, offices, cars and homes were the personal perquisites of Peter MacDonald's Navajo revolution. The reservation would become a magnet for business, lifting the Navajos out of poverty: more than 46 percent of whom had no electricity, 54 percent no indoor plumbing, and 79 percent no telephone.[32]

"The Navajo Nation is one of America's last economic frontiers," MacDonald proclaimed. "I see a wealth of opportunity for all of us. . . . Let us, once and for all, share in the bounty of America!"[33]

The program was anchored on attracting private enterprise to create jobs for the 47 percent of all Navajo adults who were unemployed. "[W]e will start by paying attention to the needs of the business world. We will offer each serious investor a package of incentives which will help ensure the profitability and security of their investment," MacDonald stated. "We will not rest until we have identified every potential business partner. We will not rest until we have studied their needs, made them proposals and *sold them on us.*" [34]

An "economic summit" was later held to endorse MacDonald's program to foster private business. In attendance were Senators Dennis DeConcini, John McCain, Peter Domenici, Daniel Inouye, and leaders of the business world, among others. Support for MacDonald's new vision was widespread.[35]

"CANDO" was the acronym for Navajo economic development. The Commission on Accelerating Navajo Development Opportunities was established. Shopping centers, tourist complexes, gambling halls, and most important, the erection of the new "CANDO" office building, symbol of the Navajo renaissance, were all envisioned.[36]

Pat Chee Miller was the Navajo embodiment of the new MacDonald program. Born in poverty and raised as a traditional Navajo of the Water's Edge Clan, Miller had built his contracting business into one of the largest Navajo-owned construction companies on the reservation. Unknown to the outside world, however, was the fact that Miller's complete financial backing was controlled by Franz Springer, a non-Indian construction entrepreneur from Albuquerque.[37]

MacDonald was undoubtedly aware of Springer's secret backing though, for when he asked Miller for a campaign contribution in September, 1986, the $1,000 came from Springer. Similarly, the bills for the banquets feting MacDonald's first year in office were all footed by Springer, in Miller's name of course.[38]

In the summer of 1988, Pat Chee Miller's bid was pending on construction of the $2.5 million CANDO office building. MacDonald summoned Miller to his remodeled executive suite in Window Rock. The two were alone and spoke in Navajo. MacDonald said he needed $4,000 immediately. Miller responded that $4,000 was quite a stiff sum for him to raise.[39]

Miller asked Franz Springer for the money. Embarrassed by MacDonald's naked demand for cash, Miller fabricated a story to claim that the Chairman needed the money for traditional Navajo prizes. Springer made out a check to cash and gave the $4,000 to Miller.[40]

The next time MacDonald was in town a week later, Miller went to see him at his renovated St. Michaels house. Miller was ready to honor MacDonald's demand—he felt he had to in order to receive the CANDO contract—except for one small problem: he already spent $1,000 out of the $4,000 on himself. Nonetheless, in front of the St. Michaels house, MacDonald got into Miller's truck. Miller handed him $3,000 in $100 bills wrapped with a rubber band, telling MacDonald that the $3,000 was "all we could spare." MacDonald thanked him and put the cash in his pocket.[41]

During the same period, MacDonald also visited Miller's house and admired his antique car collection, indicating interest in having such a car himself. Miller proceeded to purchase a replica Ford Model A, while Roy Cleveland, MacDonald's assistant, asked for another $5,000 that also made its way to the Chairman. Again, Springer was the source of funds.[42]

It wasn't long before MacDonald took his new replica Model A for a test drive around Window Rock. He was visibly delighted. The car would be great for leading parades. Yet no sooner than MacDonald was at the controls, FBI Special Agent James Elroy on behalf of the Special Committee served a Senate subpoena on Franz Springer. Miller worriedly explained the situation to MacDonald, who acted shocked and agreed Miller better not give him the car now.[43]

THE BIG BO DEAL CONTINUES

The Big Boquillas Ranch was also part of Peter MacDonald's plan to develop and rejuvenate the Navajo Nation. MacDonald cajoled the Navajo bureaucracy into support. Indeed, the Director of Land Administration even instructed the Navajo appraiser to raise his appraisal from $25-26 million to the $33.4 million asking price. There would be no negotiation by the Navajo Nation to obtain the best price, for only the asking price of Tracy and Brown assured MacDonald of his full profit. MacDonald's firm retort to questions raised by doubting bureaucrats was, "Screw 'em, do it anyway."[44]

MacDonald similarly extolled the virtues of "Big Bo" to the Navajo Tribal Council and in April, 1987, the

Council approved the purchase by a lopsided vote. On July 6, 1987, Tracy and Brown bought the ranch for $26.2 million. Two days later, it was sold to the Navajo Nation for $33.4 million.[45]

On July 14 MacDonald told Brown that he needed "some gittas," Marine Corps slang for money. They met at the Dale Robertson Golf Tournament in Oklahoma City, where Brown in his hotel room handed MacDonald $5,000 in $100 bills inside a plain envelope—right before Brown took MacDonald, his family and friends on an all-expense paid lavish trip to the Las Vegas Hilton in celebration of their new-found fortune. MacDonald, after all, was entitled to some three-quarters of a million dollars, as Brown calculated his share. The transfer would be tax-free, a fact that really irked Brown, since he had to report everything on his own tax return, including paying the tax on MacDonald's cut. But the adverse publicity surrounding the entire Big Bo transaction was greater than anticipated. Brown's intimate role and MacDonald's almost cavalier pushing of the deal began to surface in news accounts. The local BIA agency and even the Navajo Attorney General wrote critical memos. Investigations seemed inevitable.[46]

On the Orange Tree Golf Course in Scottsdale, MacDonald and Brown agreed that any large transfers from Brown might be subject to considerable scrutiny. It was simply too obvious. MacDonald therefore requested cash payoffs in $5,000 increments, whenever needed. MacDonald also felt that his phone might be tapped. So he designated the code word "golf balls" for cash. Moreover, to distance himself even further from the payoffs, he had his son, Peter "Rocky" MacDonald, Jr., act as the intermediary relaying his father's requests for "golf balls." [47]

Over the next six months, Brown transferred more than $50,000 in cash directly to Chairman Peter MacDonald, and an additional $10,000 through MacDonald's son, for a total of nearly $125,000 in payoffs before the scheme fell apart. Brown handed over cash at Christmas time when MacDonald needed "shopping expenses," for his wife Wanda's birthday party, after the Chairman was the guest on a Phoenix radio talk show, and almost always after a game of golf with MacDonald at Orange Tree or the Pima Country Club or dinner together at El Charro's or Avanti's. The cash was always delivered in a plain envelope in ordinary bills. But the requests subsided after MacDonald learned that a federal grand jury subpoena was issued to Tom Tracy. MacDonald became more guarded.[48]

Even in person, the Chairman used code. During a meeting at Phoenix's Sky Harbor Airport, MacDonald asked Brown, "Is there a way you can get some of those funny golf balls, that stuff, you know what I mean?" [49] Yet as the Senate investigation intensified and MacDonald became more desperate, over dinner at Durant's Restaurant in Phoenix, he decided to ask Brown for another $50,000. In the guise of a new note, MacDonald specified, to pay his lawyer and cover up the previous $25,000 wire transfer.[50]

THE CHAIRMAN'S COVER-UP

In late 1987 or early 1988, after Brown called the Chairman with news of the Tracy subpoena, MacDonald summoned his son and Brown to a meeting. Desperate to cover up the paper trail of the wire transfer and BMW lease, they met at a conference room in an office building Brown occasionally used in downtown Phoenix. The problem they discussed was how to make it appear that even though the funds were wired to Chairman MacDonald's account, they were somehow not for him. Since MacDonald had lied to the bank about the original purpose of the loan by stating it was related to Peter MacDonald, Jr., there was documentary "evidence" corroborating a story that he had loaned his son $25,000. Chairman MacDonald's answer was simple: the $25,000 wire was therefore a payment of Peter "Rocky" MacDonald Jr.'s loan.[51]

And it appeared equally clear to the Chairman that a similar false cover-up could account for the BMW. The luxury automobile was really for Rocky, the story went, and the Chairman simply took possession of the car as a favor to his son until Rocky returned from California to Arizona. The BMW lease payments were just part of Rocky's overall debt.[52]

Rocky was uncomfortable with the entire plan, repeatedly suggesting other cover-up stories where he was not in the middle. But all the alternatives involved money passing directly from Brown to Chairman MacDonald, dangerously too close to the truth. Peter MacDonald insisted his own son take the fall.[53]

The parties agreed to create false documents to explain why Brown would even be paying Rocky $25,000. A phony promissory note was drawn up and a fake consulting agreement between Brown and Rocky was drafted as an ostensible vehicle for paying off the note. Brown even obtained the BMW and paid the lease, the story ran, because that luxury car was necessary for Rocky to perform his "consulting work." [54]

The use of a false consulting agreement and note for Rocky was not unusual to the Chairman, since he had increasingly required so-called "consulting agreements" with Rocky to channel money to him from companies wanting to do business on the reservation. While publicly proclaiming to corporations across the country that "Navajo means business—and [come discover] what business at Navajo can mean for you," the Chairman had earlier suggested to three sizable companies that either had considerable existing business in Navajo country, or sought to, that they put Rocky on as a "consultant," at anywhere from $5,000 to $6,000 monthly. A month after entering into one of these agreements, Rocky asked the businessman for a "loan" and a false note of $36,000 was created—the precise sum demanded by the Chairman to pay for the tuition of his two daughters, Faith and Charity, at the private Cushing Academy in Massachusetts.[55]

Shortly after their meeting in Phoenix, Rocky delivered the phony note and bogus consulting agreement to Brown at his Scottsdale home. Although it was drafted simply to cover up the payoff to the Chairman, its terms actually mirrored the provisions of other consulting agreements masking extortionate demands: $5,500 a month, but for no specified work or expertise. What work could Rocky, who failed the bar exam four times, perform for Brown that was worth $66,000 a year? Who would have the receipts? What would they show and who would pay the taxes? While Rocky signed the documents he provided to Brown following his father's firm instructions, these and other questions would gnaw at the three conspirators. During many more meetings among the nervous trio throughout the year, they attempted to cement the details of their false "scenario," as they liked to call it. Even when false testimony under oath was called for, Chairman Peter MacDonald urged perjury.[56]

In August 1988, Bud Brown was served with a Senate subpoena from the Special Committee on Investigations. Brown, facing substantial perjury and obstruction charges, subsequently agreed to cooperate with Senate investigators and was fitted with a surreptitious body recorder for a series of meetings with MacDonald and his son. The tape recordings of these meetings confirmed that the Big Bo sale was viewed by MacDonald as simply a way to enrich himself, that Brown passed cash to MacDonald as part of MacDonald's share of the profits, and that MacDonald engineered an elaborate, illegal cover-up, in which he exhorted his son and Brown to take the blame, obstruct justice and commit perjury before the United States Senate.[57]

On November 22, 1988, Brown met MacDonald at Phoenix's Sky Harbor Airport after the Chairman flew in from Window Rock on one of the tribe's planes. MacDonald and Brown met for over six hours. The Chairman, of course, never realized that his words were being registered by both a small tape recorder strapped to Brown's leg and a microphone under Brown's collar transmitting to tape recorders in a nearby surveillance van. Brown showed MacDonald a purported letter from Brown's attorney raising questions about the alleged facts of the cover-up. MacDonald intently addressed the questions, trying out various versions of the story until they reached his satisfaction.[58] At that, he repeatedly instructed Brown to stick unswervingly to the fundamental lies:

Rocky, not him, asked for the $25,000;

Rocky gave Brown the Chairman's account number;

Rocky asked Brown to wire the money to the Chairman's bank account;

And Rocky made the requests because he had a legitimate consulting agreement, loan and BMW from Brown.[59]

"Whatever [the answer] is, it's got to come back to Rocky," Chairman MacDonald insisted. "And Rocky has to give the same answer," the Chairman noted.[60] MacDonald wanted to make sure the lies Brown told "sounded right":

> It had nothing to do with his father, and his father, and his father had no part in this transaction and Rocky had no part in Big Bo. It's

> you and Rocky's transaction. You got to answer these questions that way. And fill your mind and your spirit that the bottom line is that all this other stuff, the bottom line is you have an agreement with Rocky on a consulting basis. You lent him the money.[61]

MacDonald concluded his instructions by joking that maybe the tribe could sell Big Bo: "Heck, you and I could make some more money on that," he laughed. And before leaving Brown at the airport MacDonald asked for "some more funny golf balls."[62]

On December 14, 1988, Brown and Peter MacDonald, Jr. talked. Rocky comforted Brown after his supposed testimony before the Special Committee, assuring him that he and his father would commit perjury too, and "stick to the line." "We're all three of us, Three Musketeers shoulder to shoulder," Rocky said.[63]

Brown met the Chairman again on January 5, 1989. While promising Brown that he would stick to the cover-up and its perjured testimony, MacDonald began to worry about what else might be unraveled:

> If they get over the Big Boquillas bullshit and the BMW. . . . I'm sure they got ten or fifteen more other stuff that has nothing to do with you, but may have something to do with Larry Ward or . . . all these other people that I work with. . . . Face it that way. That I get rid of this, which is you and Tracy, whatever it is on Big Bo, then I'll probably have five or six other things that I still have to surmount . . . [including] John Paddock, Pat Chee Miller, there must be eight or ten of the [sic], everybody who could provide everything under the sun.[64]

On January 7, 1989, the "Three Musketeers" met again, the Chairman requesting $50,000 from Brown to pay for his lawyer and with the remaining funds Rocky could pay off the $25,000 "loan." "One way of doing it is a new note. Say $50,000 . . . I'll pay you 25 with interest and then I'll pay my lawyer with the rest of it," Chairman MacDonald said.[65]

But the cover-up came apart. Its lies could not withstand intense scrutiny and both Brown and Peter MacDonald, Jr. testified with use immunity before the Senate in early February, 1989. Their testimony was corroborated by the secret tape recordings, the wire transfer, BMW lease documents, Tracy's extensive records, and a mass of other documentary evidence, as well as numerous other interviews and depositions, some confidential. John Paddock, Pat Chee Miller, Franz Springer, Larry Ward and Johnny Donaldson also testified. The Chairman refused to testify, citing his Fifth Amendment right against self-incrimination. The Special Committee decided not to immunize MacDonald and thereby diminish in any way full prosecution for his massive wrongdoing. Moreover, since the Special Committee's policy was to grant use immunity only if the U.S. Department of Justice did not object—and the Department objected to any immunity for Chairman MacDonald while consenting to all the other immunity grants afforded by the Committee—the Special Committee did not immunize him.[66]

The Committee has forwarded its complete investigation to the Department of Justice.

THE HEARINGS' AFTERMATH

Chairman MacDonald's position had become untenable. The majority of the Navajo Tribal Council organized against his powerful hold. The Chairman promised the Council he would leave peacefully, if they would only furnish him with a legal defense fund. The Council adamantly resisted his demands and on February 16, 1989, MacDonald resigned. But the very next day, MacDonald reneged his resignation.[67]

Nonetheless, the Council by a 49 to 13 vote courageously placed MacDonald on involuntary administrative leave without the defense funds he demanded. One week later Navajo District Judge Harry Brown, MacDonald's brother-in-law, ruled the suspension invalid. Finally, on April 13, the Council's action was upheld in a landmark decision by the Navajo Supreme Court. Despite a series of tribal court orders, MacDonald supporters forcefully occupied the opulent Chairman's office until they were finally removed by Navajo police.[68]

Disregarding the will of the Navajo Nation's elected representatives, MacDonald returned to the reservation, brandishing a purported letter from the U.S. Attorney's Office. On July 19, 1989, MacDonald announced he had been cleared of all charges. He said he was issuing an executive order reinstating his police chief and was now reclaiming his rightful position as Chairman. He demanded that his band of 300 followers, many of whom were former tribal bureaucrats, retake the office of which he had been wrongfully deprived. Carrying clubs and lumber, the protestors approached the tribal offices. Several of them grabbed a Navajo Police Lieutenant, handcuffed him and severely beat him. Another Navajo police officer rushed to his aid, but a demonstrator grabbed his gun and shot the officer in the leg. At that point, the Navajo police opened fire and killed the demonstrator who shot the officer, as well as another protester. Nine people were wounded. MacDonald, who was absent, claimed the police, unprovoked, had opened fire on innocent supporters of the only rightful Navajo Chairman.[69]

CORRUPTION AMONG OFFICIALS OF TRIBAL GOVERNMENTS ELSEWHERE

Corruption among elected officials of tribal governments is not, by any means, a phenomenon limited to the Navajo Reservation. While such corruption is certainly not unique to tribal governments and many tribal officials are hard-working, scrupulously honest public servants, the Special Committee found that corruption has, at times, reached reservations and Indian communities in every region of the country.

OKLAHOMA

Oklahoma has the largest Indian population of any state in the country, followed by Arizona. Problems of corruption have existed throughout the state, touching at one time or another over the past decade many tribal governments. Indian housing, like other large federal programs where tribes exercise contracting discretion, has been particularly susceptible to corruption, depriving needy Indians of decent housing at the lowest possible cost.[70]

The experience of Kraig Kendall, one of the three largest Oklahoma housing contractors until 1985, is not atypical. In the late 1970's, when Kendall started bidding on Indian work, his proposed bids were often rated among the best by Indian housing authority staff. Yet for years he received no work.[71] He did not have to be "hit in the head with a 'two-by-four' " to figure out that he had to do "something else." [72]

For the Pawnee and Cheyenne-Arapaho small gratuities, including meals, gifts, parties and other favors were sufficient to garner the necessary influence to receive multi-million dollar contracts during the early to mid-1980's. [73]

At the Absentee Shawnee Tribe, where the scope of work bid out was considerably larger, Kendall determined that the pertinent tribal officials were great football fans, so he furnished season tickets to University of Oklahoma football games. Following that, Kendall provided an all-expense paid trip to the Orange Bowl in Miami, and eventually agreed upon a $500 per unit kickback on all contracts awarded. He received more multi-million dollar housing contracts and made his payments to Chairman of the Board Duane Ellis and Housing Director Glenn Edwards in cash. Kendall also gave the Chairman his recreational van when the Chairman profusely admired it, and when that was not enough, the Chairman asked for a new Porsche 944. [74]

Kendall's most successful relationship, however, was with the Chickasaw Nation of Oklahoma. It began with a small favor to one of the Housing Commissioners, Claudell Overton, who directed Kendall to then-Tribal Chairman and Chief Executive Officer, Governor Overton James. James first solicited a $500 "campaign contribution." Kendall and his partner made the cash payment and soon received a $6.5 million contract. But the Housing Authority staff rebelled: Kendall's bid was clearly less acceptable than other proposals. The Governor's solution was to fire the errant staff and install Claudell Overton as Executive Director. The new Director then certified Kendall to HUD. [75]

At that, the relationship flowered. Director Overton needed transportation. Kendall made all the payments on a new Lincoln Continental Mark IV, with all the trimmings. Kendall also put the Director on a $1,000-a-month no-show "consulting" contract. He gave one Housing Commissioner, W.W. "Pat" Campbell, a Ford Thunderbird, and for another, Jack Ray, performed over $12,000 in extensive remodeling on his house, free of charge. And for the others, including Stanley Foster, Kendall periodically made bogus "loans" to ensure that everyone was well taken care of. [76]

After receiving the first contract from the Chickasaws, Kendall also began to receive invoices from a pallet company owned by Governor James. Kendall had no use for pallets, nor were any ever delivered, but as Kendall promptly paid the phony invoices, the list of contracts he received from the tribe grew accordingly. At first, Kendall simply paid the fake invoices through his construction business. Since that business did not use wooden pallets, however, Kendall created more plausibility and greater distance by paying the bills through a chemical subsidiary, Southwest Chemical Company. In total, more than $94,000 in invoiced bribes were paid to former Governor James and Kendall received over $14 million of tribal contracts in return.[77]

In all of Kendall's contacts from the late 1970's to the mid-1980's through some seven years, nothing was ever expressly stated. No one used the words "bribe" or "gratuity." And there were certainly never any exact *quid pro quos,* with the one exception of the Absentee Shawnee. But the system was clear: corruption entitled the bearer of its fruits to contracts.[78]

Having successfully bribed numerous tribal government officials throughout Oklahoma, Kendall naturally tried to curry the same influence with their federal counterparts. For a short time, he successfully bought them a meal or a turkey at Christmas. But once HUD issued a stringent directive to its employees clarifying federal law prohibiting gratuities of even the most trivial character, Kendall could not pass off a mere cup of coffee.[79] The law was stern—some might say overly strict—but effective. Kendall told the Committee that the absence of similar federal laws and enforcement covering tribal officials creates a slippery slope leading towards significant corruption:

> [I]n all cases where I was able to garner influence from an Indian Housing Authority, it all started with a cup of coffee. Then it would go from there to a meal. If I were to take one of these people to a restaurant, a normal restaurant, and for lunch they ordered a $12 T-bone steak instead of a "Blue Plate Special," it became apparent to me that they wanted something from me, or I was going to be able to offer them more.

> As I look back on it, with Governor James, that started with a cup of coffee and a $500 campaign contribution and went to $94,000 in bribes over a period of just a couple of years.[80]

ADDITIONAL CORRUPT PAYMENTS

The Committee found that the federal government's lack of sufficient prohibition and enforcement has tolerated corruption at the direct expense of Indian citizens. Patterns of assorted gratuities and payments have flourished, often in seemingly trivial proportions, but always with the insidious, incremental effect of depriving Indians of honest and effective government. For example, one tribal chairman of a major Western tribe received eight television sets, a trailer home, a refrigerator and other appliances from businessmen who then received, over a period of time, contracts from the tribe. Another Western tribal chairman was given free plane rides, meals and lodging, amounting to more than $125,000 in estimated value during a six-year period, from a company engaged in extensive and continuous negotiation with the tribe.[81]

Tribal officials on another reservation established a practice in which administrators, councilmen, the chairman and their families could take "loans" secured by their tribal salaries, *i.e.*, repayment was intended through incremental payroll deductions. But, in reality, the tribal treasurer only made the deductions, if at all, on a partial basis. On another Western reservation, official travel advances and *per diem* travel expenses were authorized on an actual cost basis, a seemingly worthy goal. However, receipts were never fully required to substantiate that the travel even took place, or if it did, that the cost for airlines, lodging and food was in fact as the traveler had represented. The result was a cost for "official travel" which was approximately three times the cost of the same travel, if performed by a federal employee.[82]

In all these cases, no one has ever been convicted, let alone charged with a criminal offense.[83] That is hardly because the conduct is not clearly offensive. It is because no one—including the Congress—has sought to root out the corruption that robs the Indian people.[84]

CONFLICTS OF INTEREST

The same lack of illegality has plagued not only improper payments to some tribal officials, but the most transparent forms of gross conflicts of interest. For example, a former tribal chief executive in Oklahoma received inside information in his tribal capacity that the federal government needed a food distribution center for needy Indians on land adjacent to tribal headquarters. Armed with this advance information, the official in his individual capacity purchased the land and built a qualifying building, at a total cost of $56,000. The official then had the tribe contract with himself to provide the services for the federal government, so he could reap a profit of some $170,000.[85]

In Minnesota the tribal director of a program administered for the U.S. Department of Education to serve disadvantaged Indian youth contracted with his own business for $141,309. The work he then performed for the education program, such as cleaning services, could not be quantified or fully documented and was of questionable benefit to the children.[86]

Another Midwestern tribal chief executive also became president of a local business shortly after his election to tribal office. The business' major stockholder "loaned" the tribal chief executive the money to purchase an interest in the business. The tribal official then directed tribal contracts to the business. The tribal contracts increased the revenues of the business, thereby also raising the value of its stock. The tribal chief executive subsequently sold the stock, realizing a profit of over $600,000.[87]

And such conduct is perfectly legal for tribal officials under federal law, even though these obvious conflicts of interest significantly reduce the services for Indian people. While Congress has cared enough to protect the integrity of federal programs to outlaw conflicts by federal officials, it has not yet seen fit to outlaw the same looting when committed by tribal officials.

CONCLUSION

The litany of examples uncovered by the Special Committee indicates a pattern of abuse that must be redressed. While these abuses occur in any government—federal, state or local—what is not normal is that no matter how flagrant the conduct, Congress and the entire federal government have ignored it, aiding and abetting in the cycle of despair among American Indians. If tribal governments are to function as representatives of their people, then they must also be strong enough to be accountable to their people by not tolerating corruption, no matter what guise it hides behind.

ENDNOTES

CORRUPTION AMONG TRIBAL GOVERNMENTAL OFFICIALS

[1] *See generally*, Part Two, "A Brief History of Congressional Investigations and American Indian Affairs from 1789 to 1989" *supra*.

[2] Eugene "Pete" Twardowicz Testimony, Hearings, Part 2, Feb. 6, 1989 at p. 92; CRS Interviews, Aug. 10, Sept. 25, 1989.

[3] Byron T. "Bud" Brown Testimony, Deposition, Nov. 14, 1988 at p. 36; John Emshwiller, "Chief Under Fire," *The Wall Street Journal*, Jan. 5, 1989 at p. A1; Resume, Peter MacDonald Sr.

[4] John Paddock Testimony, Hearings, Part 2, Feb. 2, 1989 at p. 12; Pat Chee Miller Testimony, Hearings, Part 2, Feb. 2, 1989 at p. 29; Larry Ward Testimony, Hearings, Part 2, Feb. 2, 1989 at p. 47; Brown Testimony, Hearings, Part 2, Feb. 6, 1989 at pp. 139-42; Brown Deposition at pp. 36-37.

[5] Brown at p. 140.

[6] Id. at pp. 140-41; Brown Deposition at p. 37.

[7] MacDonald apparently violated other tribal election laws as well, including not reporting these and other campaign contributions, exceeding spending limits and filing false statements. T.11, Navajo Tribal Code, Election Law of 1966, Ch. 1, Subch. 9, Sections 171, 172, 175. Paddock at pp. 7-8, 12-13, 21-22, 24-25; Miller at pp. 29-34; Springer at pp. 38-41; T. 11, Navajo Tribal Code, Election Law of 1966, Ch. 1, Subch. 9, Section 171(c); *See* Chart, Payments/Gratuities for MacDonald from Paddock/FAITHCO (Hearings, Part 2, Feb. 2, 1989 at pp. 300-03); Promissory Note and Check, FAITHCO (John Paddock) to Peter and Wanda MacDonald for $35,000, Dec. 1, 1987 (Hearings, Part 2, Feb. 6, 1989 at pp. 304-05); Check, Springer Construction Company (Franz Springer) to Pat Chee Miller for $1,000, Sept. 23, 1986 (Hearings, Part 2, Feb. 6, 1989 at p. 312); Check, Springer Construction Company (Franz Springer) to the Navajo Nation, Office of the Chairman and Vice Chairman for $1,000, Jan. 21, 1988 (Hearings, Part 2, Feb. 6, 1989 at p. 313), Springer Construction Company (Franz Springer) to Cash for $5,000, June 9, 1988 (Hearings, Part 2, Feb. 6, 1989 at p. 314); Check, Springer Construction (Franz Springer) to Cash for $4,000, July 29, 1988 (Hearings, Part 2, Feb. 6, 1989 at p. 314); Check, Springer Construction Company (Franz Springer) to Roy Cleveland for $5,000, Aug. 16, 1988 (Hearings, Part 2, Feb. 6, 1988 at p. 316).

[8] *See* Installment Loan Funding Sheet, United New Mexico Bank for Peter MacDonald for $70,000 Unsecured Loan, Jan. 29, 1986; Lonnie Hamilton Interview, Nov. 17, 1988; Minutes of Executive Loan Committee Meeting of United New Mexico Bank (Gallup), Feb. 6, 1986; Peter "Rocky" MacDonald, Jr., Testimony, Hearings, Part 2, Feb. 6, 1989 at p. 18.

[9] Brown at p. 141.

[10] Id. at p. 143; Brown Deposition at pp. 26, 40-48, 51-52, 88-89, 111-14; Twardowicz at pp. 102-03; *See* Check, "Peter MacDonald Foundation" (signed by Byron T. "Bud" Brown) to Citibank—"P.M. expenses" for $547.78, Dec. 8, 1986; Citibank Visa statement for Bud T. Brown, Nov. 14, 1986; Check, Bud Brown to Aloha Airlines—"airfare" for $480, Nov. 28, 1986 (Hearings, Part 2, Feb. 6, 1989 at p. 340); Airline Coupons, Aloha Airlines, for Mr. and Mrs. Brown and Mr. and Mrs. MacDonald, Nov. 28, 1986 (Hearings, Part 2, Feb. 6, 1989 at p. 341); Airline Coupons, Aloha Airlines, Mr./Mrs. Brown and Mr./Mrs. MacDonald (Kona-Maui-Kona-Honolulu), Nov. 28, 29 and Dec. 1, 1986; Airline Ticket and Receipt, Aloha Airlines, Mr./Mrs. Brown and Mr./Mrs. MacDonald (Honolulu to Kona) for $147.80, Dec. 1, 1986; United Airlines Tickets for Hope MacDonald, Phoenix-Honolulu-Phoenix, for $967.90, Dec. 1-5, 1986 (Hearings, Part 2, Feb. 6, 1989 at p. 340); Check Recorder—Description of Transaction, Western Airlines (check #466) for $3,315.18, Nov. 14, 1986; Check, Byron T. "Bud"/Carol Brown to Cash—"Hawaii Expenses" for $2,000, Nov. 19, 1986; Check, Byron T. "Bud"/Carol E. Brown to The Westin Maui (Kea) for $200, Nov. 30, 1986; Room Registration Cards, Intercontinental Hotel (Maui), Mr./Mrs. Brown (#5414) and Mr./Mrs. MacDonald (#5418), Nov. 28-29, 1986; Room Bills, Intercontinental Hotel (Maui), Mr./Mrs. Brown (#5414) and Mr./Mrs. MacDonald (#5418) for $810.65 (total), Nov. 28-29, 1986; Charge Receipt, Intercontinental Hotel (Maui), Bud Brown Visa—Incidentals Only for Rooms #5414/#5418 for $498.65, Nov. 29, 1986; Guest Registration Cards, Hilo Hawaiian Hotel (Hilo), Mr./Mrs. Brown (#704) and Mr./Mrs. MacDonald and daughter (#702), Dec. 2-3, 1986; Room Bills, Hilo Hawaiian Hotel (Hilo), Mr./Mrs. Brown (#704) and Mr./Mrs. MacDonald and daughter (#702) for $2230.06 (total), Dec. 2-3, 1986; Charge Receipt, Hilo Hawaiian Hotel (Hilo), Bud Brown Visa—Tabs for Rooms 702, 703 (a third party), and 704 for $256.36, Dec. 2-3, 1986; Bank Statement, Bud/Carol Brown, Visa Debit—Kona Fisherman's Landing (posted Dec. 12, 1986) for $324.16, Jan. 6, 1987.

[11] Brown at pp. 141-44; Brown Interview, Sept. 28, 1989.

[12] Brown at pp. 141-42.

[13] Twardowicz at pp. 92-94, 99; Mel Jans, Tenneco West, Interview, Oct. 27, 1988; *See The Wall Street Journal*, Sept. 7, 1984 at p. 20; Internal Memorandum, Tenneco West from Melvin Jans to Allen T. McInnes re: Big Boquillas Ranch Sale, Aug. 21, 1987; *See* Escrow Instructions, Ticor Title Insurance, #H 177401 SRA, between Big Boquillas Cattle Company (c/o Tenneco West) and Topanga Properties, Ltd., Pension Trust (c/o Scott A. Rose, Esq.), Dec. 5, 1986; Escrow Title Instructions, Ticor Title Insurance, #177340, between Boquillas Cattle Company (c/o Tenneco West) and EGB Investments, Sept. 30, 1986; Escrow Title Instructions, Ticor Title Insurance, #159604SRA, between Boquillas Cattle Company (c/o Tenneco West) and Karl Solomon Investments, Feb. 13, 1985.

[14] Brown at pp. 142, 144.

[15] Paddock at pp. 12-14, 16-18; *See* Chart, Payments/Gratuities for MacDonald from Paddock/FAITHCO (Hearings, Part 2, Feb. 2, 1989 at pp. 300-02); Promissory Note and Check, John Paddock (FAITHCO) to Wanda and Peter MacDonald for $35,000, Dec. 1, 1987 (Hearings, Part 2, Feb. 2, 1989 at pp. 304-05).

[16] Paddock also "loaned" Roy Cleveland, MacDonald's aide-decamp, $3,200, which was never repaid. Paddock at p. 19; *See* Promissory Note and Check, John Paddock (FAITHCO) to Roy Cleveland for $3,200, Feb. 15, 1988 (Hearings, Part 2, Feb. 2, 1989 at pp. 306-07); MacDonald at p. 124; William Aubrey Testimony, Part 1, Jan. 31, 1989 at pp. 158-59; Peter MacDonald, Jr. Testimony, Deposition, Jan. 10, 1989 at p. 35.

[17] Internal Memorandum, Tenneco West; Brown at p. 144. Fifty percent of the mineral rights were later included to increase price to $26 million. Id. at pp. 152-53.

[18] Id. at pp. 145-47; *See* Certificate of Fictitious Name, State of Arizona, County of Maricopa, Tracy Oil & Gas, d/b/a Big Boquillas Cattle Co., Jan 11, 1987.

[19] Brown Deposition at pp. 104-05; Brown at pp. 146-47, 150; *See* Check, Bud Brown to Holiday Inn—"PM Expenses" for $683.41, Jan. 15, 1987; Installment Loan Funding Sheet; Dealer Lease Agreement between Camelback BMW Porsche & Audi (AZ) and Chairman Peter MacDonald for 735i BMW Sedan (Hearings, Part 2, Feb. 6, 1989 at p. 365).

[20] Brown at pp. 147-50; Twardowicz at pp. 96-97; *See* Internal Memorandum, Tenneco West.

[21] Brown at pp. 148-49.

[22] Tracy sent his letter under the phony company guise of the "Big Boquillas Cattle Company" on February 20, 1987. Letter, Tom Tracy (Big Boquillas Cattle Company) to Peter MacDonald (Navajo Nation), Feb. 20, 1987. Brown at pp. 148-49; Hamilton Interview; *See* Wire Transfer Order, Valley National Bank of Arizona from Reppel Steel & Supply Co. for Credit to Peter MacDonald account, United New Mexico Bank (Attn: Lonnie Hamilton) for $25,000 and Credit Receipt, United New Mexico Bank, Feb. 24, 1987 (Hearings, Part 2, Feb. 7, 1989 at pp. 363-64); Handwritten Notes, Wayne James, Tracy Oil & Gas re: Big Boquillas Expenses, May 26, 1987 (Hearings, Part 2, Feb. 7, 1989 at p. 350).

[23] Brown at pp. 150-51; *See* Dealer Lease Agreement; James Donaldson, Owner, Camelback Porsche/Audi/BMW (Phoenix, Arizona), Interview.

[24] Brown at pp. 152-53; *See* Tracy letter.

[25] Brown at pp. 146-47, 152-53; *See* Check, Byron T. "Bud" Brown to Cash for $5,000, June 5, 1987.

[26] MacDonald's Inaugural Speech, Jan. 13, 1987 (Vital Speeches of the Day, Mar. 15, 1987).

[27] Paddock at pp. 17-18; Johnny Donaldson Testimony, Hearings, Part 2, Feb. 2, 1989 at p. 70; *See* Susan Landon, "Navajo Group calls dream a nightmare," *Albuquerque Journal*, Aug. 7, 1988 at p. D1.

[28] Donaldson at pp. 65-66, 69-71; MacDonald at p. 117; Ward at pp. 47-49, 51, 53.

[29] Id. at pp. 49-52; Donaldson at pp. 62-63, 66-69.

[30] Paddock at p. 13; *See* Chart, Payments/Gratuities for MacDonald from Paddock/FAITHCO—Aircraft Expenses (Hearings, Part 2, Feb. 2, 1989 at pp. 300-02); Drex Hansen Testimony, Hearings, Part 2, Feb. 6, 1989 at pp. 80-82, 85-86; *See* Agreement and Settlement of All Accounts between American West Aircraft and The Navajo Nation, Mar. 5, 1988; Wire Transfer (credit), Navajo Nation (Found-

ers Bank) to American West Aircraft Company (First Interstate Bank) for $64,269.48, Mar. 11, 1988 (Hearings, Part 2, Feb., 1989 at p. 323). When American West refused to pay a $45,000 kickback to another tribal official, the tribe subsequently bought the same planes elsewhere at a higher price. Hansen at pp. 86–87. *See* "Navajo group calls dream nightmare."

[31] "On the Warpath," The Reporters, Fox Television, June 10, 1989.

[32] We, The First Americans, Bureau of the Census, U.S. Department of Commerce at p. 26.

[33] MacDonald Inaugural Speech.

[34] Indian Service Population and Labor Force Estimates, Bureau of Indian Affairs, U.S. Department of the Interior, Jan. 1989 at p. 1; MacDonald Inaugural Speech (emphasis in original).

[35] Sandra Atchison with Peter Finch, "Suddenly Peter MacDonald Is Businesses Best Friend," *Business Week*, Aug. 10, 1987 at p. 64; Dinah Wisenberg, "Navajo Nation Plans Economic Summit to Draw Business," *The Mesa Tribune*, Apr. 1, 1987 at p. A14; Guy Webster, "Navajos Mean Business," *The Arizona Republic*, July 20, 1987 at p. A1.

[36] Progress Report, Commission for Accelerating Navajo Development Opportunity, June 1988; Miller at pp. 28, 30.

[37] Id. at pp. 26–28, 34–35; Johnny Donaldson Interview, Nov. 16, 1988; Springer at pp. 36–38. *See* Part Three, Chapter 1 *supra*.

[38] Miller at pp. 29, 34; Springer at pp. 38–39.

[39] Miller at pp. 30, 32.

[40] Id. at pp. 30–31; Springer at p. 38; *See* Check, Springer Construction Company to Cash for $4,000, July 29, 1988 (Hearings, Part 2, Feb. 2, 1989 at p. 315).

[41] Miller at p. 31.

[42] Miller at pp. 31–33; Springer at p. 39; *See* Check, Springer Construction Company to Cash for $5,000 (Hearings, Part 2, Feb. 2, 1989 at p. 314); Check, Springer Construction Company to Roy Cleveland for $5,500, Aug. 16, 1988 (Hearings, Part 2, Feb. 2, 1989 at p. 316).

[43] Miller at p. 32–33; Springer at p. 39; *See* United States Senate Subpoena, Special Committee on Investigations for Franz Springer, returnable Sept. 8, 1988 (served on Aug. 31, 1988).

[44] Susan Landon, "Arizona Ranch Purchase Stirs Navajo Controversy," *Albuquerque Journal*, Aug. 23, 1987 at p. A8; Bill Donovan, "Navajos OK $33 Million Bond Sale to Buy Ranch," *The Arizona Republic*, July 1, 1987 at p. B1; Betty Reid, "Some Want Lower Big Boquillas Price," *The Gallup Independent*, Apr. 24, 1987; Signed Statement, Bob Pencall, Realty Appraiser, Bureau of Indian Affairs, July 2, 1987 (Hearings, Part 2, Feb. 6, 1989 at p. 328); Memorandum of Value of The Big Boquillas Ranch, Edison Wood, Appraiser, Title, Records & Appraisal Section, Office of Navajo Administration, Mar. 3, 1987 (w/notations); Hansen at p. 83.

[45] Betty Reid, "MacDonald Sees Big Benefits in Boquillas," *The Gallup Independent*, Apr. 23, 1987; Resolution of the Navajo Tribal Council—"Approving and Authorizing the Acquisition of the Big Boquillas Ranch," Apr. 30, 1987; Tribal Council Minutes, Navajo Nation, Apr. 9, 1987; *See* Special Warranty Deed, Boquillas Cattle

Company to Tracy Oil & Gas Co., d/b/a Big Boquillas Cattle Co. to the Navajo Tribe of Indians, July 8, 1987; Twardowicz at p. 109.

[46] Brown at pp. 155-57; *See* Check, (signed by Byron T. Brown) to Cash for $9,000, July 14, 1987 (Hearings, Part 2, Feb. 7, 1989 at p. 370); Room Bills, Las Vegas Hilton, Brown (#21-109) and MacDonald (#'s 830 and 831) totaling $1,795.38, Aug. 16-18, 1987 (Hearings, Part 2, Feb. 7, 1989 at pp. 371-74); Check (signed by Byron T. Brown) to Cash—"E.L.V." for $7,500, July 29, 1987 (Hearings, Part 2, Feb. 7, 1989 at p. 70); Check (signed by Byron T. Brown) to Hilton—"fun & games" for $12,000, Aug. 19, 1987 (Hearings, Part 2, Feb. 7, 1989 at p. 375); Letter, Michael Upshaw, Navajo Attorney General to Wilson Barber, Area Director, and Floyd Espinoza, Acting Assistant Area Director, Navajo Area Office, BIA, Re: Big Boquillas Ranch, July 7, 1987; File Memo, Luther Dean Moss, Staff Appraiser, ARPM/Appraisal Section (BIA), Re: Big Boquillas Ranch, July 2, 1987.

[47] Brown at pp. 156-58; MacDonald at pp. 125-26.

[48] Brown at pp. 158-60, 162; *See* Check, Byron T. "Bud" Brown/Carol E. Brown to Cash for $7,500, Dec. 17, 1987 (Hearings, Part 2, Feb. 7, 1989 at p. 375); Brown Interview.

[49] Transcript, Surreptitious Recordings of Bud Brown and Peter MacDonald, Sr., Nov. 22, 1988 (Hearings, Part 2, Feb. 7, 1989 at pp. 183, 402).

[50] Brown at pp. 160-61; Transcript, Surreptitious Recording of Bud Brown, Peter MacDonald, Sr., and Peter "Rocky" MacDonald, Jr., Jan. 7, 1989 (Hearings, Part 2, Feb. 7, 1989 at pp. 181-82, 400).

[51] Brown at pp. 162-63; MacDonald at pp. 118-19; *See* Loan Installment Sheet.

[52] Brown at pp. 161-62; MacDonald at pp. 119-20.

[53] MacDonald at pp. 122-23; Brown at pp. 163-64.

[54] MacDonald at p. 120; Brown at pp. 162-64; *See* Promissory Note, Peter MacDonald, Jr. to Byron T. Brown for $25,000, Jan. 14, 1987, and Consulting Agreement between Romac Enterprises (Peter MacDonald, Jr.) and Bud Brown Enterprises (Byron T. Brown), Jan. 1, 1988 (Hearings, Part 2, Feb. 6, 1989 at pp. 347-49).

[55] "Navajo Means Business," Navajo Nation Brochure; MacDonald at pp. 123-24; MacDonald Deposition at pp. 32-34; Aubrey at pp. 158-60.

[56] MacDonald at p. 120; Brown at pp. 163-65; *See* Consulting Agreement; *See generally* Transcripts, Surreptitious Recordings, Bud Brown, Peter MacDonald, Sr., and Peter "Rocky" MacDonald, Jr., Nov. 22, Dec. 14, 1988, and Jan. 5 and 7, 1989 (Hearings, Part 2, Feb. 7, 1989 at pp. 379-403).

[57] Brown at p. 164; *See* United States Senate Subpoena, Special Committee on Investigations for Byron T. "Bud" Brown, returnable Sept. 8, 1988 (served Aug. 17, 1988); A. Melvin MacDonald Testimony, Hearings, Part 2, Feb. 7, 1989 at pp. 132-33; Transcripts, Surreptitious Recordings.

[58] Brown at pp. 165, 167-68; MacDonald at p. 134; *See* Transcript, Nov. 22, 1988 at pp. 167-76, 379-92; Letter, Mel McDonald, Esq., to Bud Brown, Nov. 15, 1988.

[59] Peter MacDonald, Jr. categorically denied all these obvious lies in his sworn Senate testimony:

Mr. Kenneth Ballen [Chief Counsel]. Mr. MacDonald, in fact, you never asked for the $25,000 from Brown, did you?

Mr. Peter MacDonald, Jr. No, I did not.

Mr. Ballen. You never gave Brown your father's account number, did you?

Mr. MacDonald. No, I did not.

Mr. Ballen. You never asked Brown to wire that sum to the United New Mexico Bank?

Mr. MacDonald. No, I did not.

Mr. Ballen. You never agreed to the consulting contract with the loan as an advance on it?

Mr. MacDonald. No, I did not.

Mr. Ballen. There was no loan to you at all, and the downpayment on the BMW was not made for you, was it?

Mr. MacDonald. No, it was not.

Mr. Ballen. You never asked for the car?

Mr. MacDonald. No.

Mr. Ballen. You never asked for the money?

Mr. MacDonald. No.

Mr. Ballen. You never asked for the cover-up, did you?

Mr. MacDonald. No.

* * * * *

Mr. Ballen. Mr. MacDonald, let me ask you this: why did you choose to participate in it?

Mr. MacDonald. Because I love my father.

MacDonald at pp. 126-27.

[60] Transcript, Nov. 22, 1988 at pp. 170, 382.

[61] Id. at pp. 174, 390.

[62] Transcript at pp. 183-84, 402-03.

[63] Brown at p. 176; Transcript, Dec. 14, 1988 at pp. 176, 393-94.

[64] Brown at p. 178; Transcript, Jan. 5, 1989, pp. 180, 398-99.

[65] Brown at pp. 160-61, 180; Transcript, Jan. 7, 1989 at pp. 181, 401.

[66] *See generally* MacDonald Hearings, Part 2, Feb. 6, 1989; Brown Hearings, Part 2, Feb. 7, 1989; *See also* Immunity Order, United States District Court for the District of Columbia (signed by Aubrey E. Robinson, Jr., Chief Judge) for Peter MacDonald, Jr., Jan. 9, 1989 (Hearings, Part 2, Feb. 6, 1989 at p. 352); Immunity Order, United States District Court for the District of Columbia (signed by Aubrey E. Robinson, Jr., Chief Judge) for Byron T. (Bud) Brown, Oct. 12, 1988 (Hearings, Part 2, Feb. 7, 1989 at p. 138); *See generally* Paddock Hearings, Part 2, Feb. 2, 1989; Miller Hearings, Part 2, Feb. 2, 1989; Springer Hearings, Part 2, Feb. 2, 1989; James Hearings, Part 2, Feb. 2, 1989; Ward Hearings, Part 2, Feb. 2, 1989; Donaldson Hearings, Part 2, Feb. 2, 1989; Senator Dennis DeConcini, Chairman, Special Committee on Investigations, Hearings, Part 2, Feb. 6, 1989 at pp. 79-80.

[67] "Council Members Says Action Likely," *Associated Press* wire, Feb. 14, 1989; Susan Kelleher, "MacDonald Ousted From Navajo Post," *The Washington Post*, Feb. 17, 1989 at p. A10; "MacDonald Recesses Council Meeting Over Protests," *Associated Press* wire, Feb. 16, 1989; Susan Kelleher, "Navajo Leader Reverses Stance,"

The Washington Post, Feb. 18, 1989 at p. A2; Mark Shaffer, "Navajo Head Reverses Self, Claims Power," *The Arizona Republic*, Feb. 18, 1989 at p. A1.

[68] Id.; Tamara Jones, "Suspended Navajo Leader Seeks to Regain Post, Triggers Tribal 'State of Emergency,'" *Los Angeles Times*, Feb. 18, 1989; "Navajo Council Meets to Choose Interim Leaders," *Associated Press* wire, Feb. 21, 1989; Betty Reid, "High Court OK's MacDonald Ouster," *The Gallup Independent*, Apr. 14, 1989 at p. A1; "On the Warpath"; "Navajo police enforce ban on MacDonald," *Associated Press* wire, *The Albuquerque Tribune*, Apr. 8, 1989 at pp. A1-2.

[69] Mark Trahant, "MacDonald—Ever Defiant," *The Arizona Republic*, July 22, 1989 at p. A2; Mark Trahant and Bill Donavan, "MacDonald's Exoneration Claim Rebutted," *The Arizona Republic*, July 21, 1989 at p. A5; Mark Shaffer and Mark Trahant, "Rivals Blame MacDonald for Fatal Riot," *The Arizona Republic*, July 22, 1989 at pp. A1, A10; Executive Order, Peter MacDonald, Sr., Chairman of Navajo Tribal Council to William Kellogg, Chief of Police of Division of Public Safety, July 20, 1989; Larry Lopez, "Reservation Melee Leaves Two Dead, Nine Wounded," *Associated Press* wire, July 21, 1989; Bill Donovan, "MacDonald Backers Storm Offices—1 Killed, 11 Hurt," *The Arizona Republic*, July 21, 1989 at p. A1; Betty Reid, "Chairmen Say Other to Blame," *The Gallup Independent*, July 22, 1989 at p. A1.

[70] *See* We, The First Americans; Indian Service Population and Labor Force Estimates; Richard James Elroy Testimony, Special Agent (FBI), Special Committee on Investigations, Hearings, Part 2, Feb. 8, 1989 at p. 211; William Kraig Kendall Testimony, Hearings, Part 2, Feb. 8, 1989 at pp. 181-83.

[71] Id. at p. 180; "It wasn't enough to go in and just lay your cards on the table and shoot them the best deal you could . . . ." Kendall Testimony, Deposition, Jan. 14, 1989 at p. 9.

[72] Id. at p. 17; Kendall at p. 180.

[73] Id. at p. 181; Kendall Deposition at pp. 11-13.

[74] Kendall at pp. 181-83.

[75] Id. at pp. 184-85.

[76] Id. at pp. 185, 187; Kendall Interview.

[77] Kendall at pp. 185-86. Like Bud Brown, Kendall was wired to tape-record his activities. While Kendall pled guilty to a felony charge and served time in prison, none of the tribal officials to whom Kendall paid bribes, including Governor James, were convicted of more than misdemeanors because of the extreme difficulty federal prosecutors had in bringing cases due to gaps in the federal criminal code. Id. at p. 190. Letter, William Price, U.S. Attorney, Oklahoma (Western District), to Kenneth Ballen, Chief Counsel, Special Committee on Investigations, Sept. 2, 1988.

[78] Kendall at p. 187.

[79] Id. at pp. 187-88.

[80] Id. at p. 184.

[81] Names of tribal officials are not made part of the report where the case is either under investigation by the Department of Justice, has been referred by the Committee, or is otherwise closed. The only case besides Kendall where the Committee has become aware of alleged potential corruption and subsequently it has been

charged is on the Crow Reservation. On July 24, 1989, a 35-count federal indictment was returned against the Crow Tribal Chairman, Richard Real Bird, and 25 other Crow officials charging them, *inter alia*, with bribery, embezzlement, bank fraud and false statements. *See* Indictment, U.S. District Court, District of Montana, Billings Division, *U.S.* v. *Real Bird, et al*, July 24, 1989; Internal Confidential Memorandum, Special Committee on Investigations, Special Agent Richard James Elroy (FBI) to Members of the Special Committee, Feb. 9, 1989 at pp. 11-12.

[82] Id. at p. 12.

[83] *See* note 81 *supra*; Elroy, Feb. 8 at pp. 204, 206. *See generally*, Philip Hogen, U.S. Attorney, South Dakota; Stephen McNamee, U.S. Attorney, Arizona; William Lutz, U.S. Attorney, New Mexico; William Price, U.S. Attorney, Oklahoma (Western District); Richard Allen Stacy, U.S. Attorney, Wyoming; Testimony, Hearings, Part 2, Feb. 8, 1989 at pp. 250-69.

[84] Id. Another problem uncovered by the Committee was the infiltration of organized crime into some Indian bingo establishments managed by non-Indian companies. Organized crime has skimmed proceeds and otherwise deprived these tribes of the true profits from their bingo and other gambling enterprises. Organized crime penetration was at times accompanied by payments to local tribal officials. *See generally*, Hearings, Part 2, Feb. 8, 1989 at pp. 212-50. Elroy, Feb. 8, 1989 at pp. 204-05.

[85] Id. at p. 206.

[86] Id.

[87] Internal Memorandum, Elroy at p. 11; Elroy, Feb. 8, 1989 at pp. 206-07.

PART FOUR

LEGISLATIVE RECOMMENDATIONS

The Special Committee on Investigations has submitted or will submit specific legislation to accomplish the following:

AGREEMENTS FOR A NEW FEDERALISM FOR AMERICAN INDIANS

To begin a new era of commitment to tribal self-government and federalism, the Special Committee will propose legislation to create and fund the Office of Federal-Tribal Relations (OFTR), within the Executive Office of the President. The OFTR will be responsible for negotiating new, formal agreements with federally-recognized Indian tribes and overseeing the implementation of those agreements. Each new agreement will be signed by the tribal chairman, chief executive or other duly authorized representative of the tribe and the President of the United States and must be ratified by both Houses of Congress. The agreements will allow any tribe that so chooses to exit the current bureaucracy of federal Indian programs and, instead, receive and use at its own discretion a proportional share of the current federal Indian budget.

The legislation will provide the OFTR with the authority on behalf of the United States to negotiate agreements that:

(1) Recognize tribes' permanent right to exercise self-government, including their rights to determine their own form of government, legislative prerogatives, judicial system and tribal membership;

(2) Relinquish all its existing paternalistic powers, principally under Title 25 of the United States Code, to review and approve or disapprove tribal constitutions, constitutional amendments, bylaws, legal codes, resolutions, ordinances, contracts, leases, and other transactions entered into by tribes;

(3) Provide tribes with an annual Tribal Self-Governance Grant (TSGG), equal to their proportional share of the current federal Indian budget, as a permanent entitlement with an annual cost-of-living allowance; and

(4) Transfer from the Bureau of Indian Affairs (BIA), the Indian Health Service (IHS) and other federal Indian programs to the tribes such assets as necessary for the tribes to carry out those responsibilities they will assume under agreements.

Under the new agreements American Indian tribes will agree to:

(1) Assume full responsibility for self-government;

(2) Declare their governments and members ineligible for all federal programs specifically targeted to American Indian tribes or individuals, other than TSGG's;

(3) Adhere to standards of accountability for the use of TSGG's, as established by the OFTR (in conjunction with the tribes and the Office of Management and Budget);

(4) Operate their governments in accordance with written constitutions that adhere to the Indian Civil Rights Act and have been approved by a majority of all enrolled, adult tribal members in a special ratification referendum; and

(5) Publicly report certified financial statements analyzing the budgets of their governments and all tribally-owned businesses.

New agreements will have no impact on tribal governments' current legal status or jurisdiction vis-a-vis the states, or on the obligations or federal funding of state, county and municipal governments, school systems or agencies. Nor will they affect the water rights, land claims, or hunting or fishing rights of any individual or government, Indian or non-Indian.

Funds for the OFTR, as well as the TSGG's, will be transferred directly out of the budgets of current federal Indian programs. The OFTR will be required to enforce the tribes' compliance with the requisite standards of accountability, and share information and coordinate with federal law enforcement to guarantee that criminal sanctions against corruption are fully enforced. The OFTR also will be charged with collecting and disseminating to all American Indian households data comparing the progress of tribes under the new system of agreements with that of tribes choosing to remain under current federal Indian programs.

To usher in the New Federalism for American Indians, the Special Committee also recommends that each House of Congress create a permanent full Committee on Indian Affairs, with additional staff specifically assigned to perform oversight and investigations.

TRIBAL ACCOUNTABILITY

Strict accountability is essential to ensure that Tribal Self-Governance Grants, as well as funds given to tribes under current programs, are not misappropriated. The Special Committee will propose legislation to:

(1) Amend current federal criminal laws to specifically proscribe the misappropriation of TSGG's or other federal funds by tribal governmental officials and employees, as well as other misconduct by tribal officials and employees, including the acceptance of gratuities and engaging in conflicts of interest;

(2) Create new federal criminal laws to specifically preclude any individual—Indian or non-Indian—from depriving or defrauding the members of any Indian nation or tribe of (i) the honest services of a tribal official or employee, (ii) a fair and impartially conducted election, or (iii) the right to have the affairs of the tribe conducted on the basis of complete, true, and accurate material information;

(3) Provide relief to any tribal or federal official or employee who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against because he assists in the investigation or prosecution of public corruption;

(4) Create new federal criminal laws to specifically preclude any tribal official or employee from willfully failing to maintain federally-required records, for accounting or other purposes, concerning a tribal government or a tribally-owned business; and

(5) Provide funding to hire additional Federal Bureau of Investigation agents and Assistant United States Attorneys and to create a new office within the Department of Justice to investigate al-

legations against, and prosecute violations of federal criminal laws by, tribal governmental officials and employees.

INDIAN PREFERENCE CONTRACTING

To increase the economic opportunities for Indian-owned businesses, the Special Committee recommends passage of S. 321, the "Indian Preference Act of 1989." As drafted by the Special Committee and the Select Committee on Indian Affairs and already reported favorably by the Select Committee to the full Senate on September 15, 1989, S. 321 will:

(1) Consolidate into one statute all existing laws which provide for Indian preference in contracting;

(2) Provide uniform standards, applicable to all federal and tribal contracting agencies, to determine which Indian-owned businesses qualify for Indian preference;

(3) Establish an Office of Indian Preference within the Department of the Interior responsible for reviewing contractors' qualifications for Indian preference and certifying as eligible for preference all businesses which meet the uniform standards;

(4) Create a fund from which Indian-owned businesses can obtain the bonding necessary for government contracts; and

(5) Create specific and enhanced federal criminal and civil penalties, including disbarment and fines, for contractors and individuals found to be abusing Indian preference.

PREVENTING CHILD ABUSE

To confront and deter the tragedy of child sexual abuse on Indian lands, the Special Committee recommends passage of S. 1783, the "Indian Child Abuse Prevention and Treatment Act." As drafted by the Special Committee and the Select Committee on Indian Affairs, S. 1783 will:

(1) Create a mandatory reporting law, similar to those enacted by the states, which requires the BIA, IHS, and other federal and tribal employees to report to the FBI, law enforcement or child protection agencies instances or allegations of child abuse

by teachers and other adults responsible for the care of children;

(2) Create federal criminal penalties for the failure to report instances or allegations of child abuse;

(3) Provide immunity from civil slander suits to those who, in good faith, report instances or allegations of child abuse;

(4) Require federal and tribal agencies to conduct background checks of individuals hired in educational, correctional, child-caring and other fields where personnel have regular contact with or control over Indian children;

(5) Establish a reliable database of child abuse incidents for statistical purposes and to assist background checks of prospective federal and tribal employees; and

(6) Improve mental health treatment for abuse victims on Indian lands by amending the Victims of Crime Act of 1984, codified at 42 U.S.C. § 10601(c)(1), to increase the Crime Victim's Fund by $10 million specifically to provide treatment services to Indian children.

INDIAN NATURAL RESOURCES AND RELATED ROYALTY INCOME

Under the New Federalism for American Indians, tribes may ultimately choose to assume all royalty accounting, auditing, receipt and on-site inspection functions from the federal government. However, in the interim, the Special Committee will propose legislation to:

(1) Transfer all Indian royalty distribution responsibilities of the BIA and all Indian lease inspection responsibilities of the Bureau of Land Management (BLM) to the Minerals Management Service (MMS), thus consolidating the management of all Indian mineral resources and related royalties into one agency;

(2) Mandate that all run tickets issued by purchasers of crude oil produced on Indian and federal lands contain certain minimum information, including the quantity and quality of oil purchased and identification of the personnel and vehicles involved in removing the oil. Each run ticket must be certified as true and full by an officer of the corporation

purchasing the crude oil. Similar certifications will be required for meter charts issued by purchasers of natural gas. Federal criminal laws will set penalties for any forgeries or false statements made by any party on the run ticket, meter chart, or related papers, failures by the purchasing company to leave a copy of the run ticket, meter chart, or related papers at the lease or facility from which the oil or gas is removed or with the operator of the lease facility, and failures to maintain run tickets and meter charts;

(3) Mandate that all purchasers of Indian or federal crude oil or natural gas submit an annual report providing detailed information as to the "short" and "long" figures reported to such purchaser by its gaugers, employees or other representatives charged with receiving crude oil or natural gas from pipelines or wells located on Indian or federal leases. The report will be certified as true, subject to federal criminal laws, by an officer of the purchaser and will be submitted to MMS, the new agency responsible for inspecting Indian leases;

(4) Mandate that MMS, the new Department of the Interior agency responsible for inspecting Indian leases, periodically inspect meters relating to oil and gas production on Indian lands, and issue mandatory penalties to any purchaser whose meters are defective or do not meet minimum standards;

(5) Mandate that the Federal Bureau of Investigation and MMS, the new Department of the Interior agency responsible for inspecting Indian leases, create a joint working group to increase the flow of theft information between the two agencies. The FBI will also provide training seminars for Department of the Interior personnel involved with on-site inspection or investigations of natural resource theft;

(6) Amend the Federal Oil and Gas Royalty Management Act (FOGRMA) to eliminate the cure period for civil penalties and to clarify that civil penalties can be issued for, among other things, underpayments of royalties, whether intentional or otherwise, and failure of parties to provide records

to MMS within a reasonable time period after MMS demands them;

(7) Amend FOGRMA to allow MMS the power to cancel under certain conditions Indian and federal leases if lessees violate lease provisions and such violations lead to royalty underpayments;

(8) Amend FOGRMA to allow rewards for information leading to recovery of royalty and other payments on tribal, allottee and federal leases;

(9) Amend FOGRMA to clarify the time period for which Indian and federal lessors must retain records pertinent to the payment of royalties, and to provide MMS clear authority to demand receipt of such records within a reasonable period following demand;

(10) Amend FOGRMA to provide 100 percent funding to Indian tribes participating in joint audit agreements pursuant to FOGRMA;

(11) Provide MMS authority to issue penalties, cancel leases under certain conditions, provide rewards, and enter into cooperative agreements relative to non-oil and gas tribal, allottee, and federal leases;

(12) Require MMS to keep statistics on the number of tribal and allottee leases audited, the product and geographic area of such leases, and the causes of underpayments discovered by the audit of such leases. MMS should distribute such statistics annually to all mineral-producing tribes and allottees and provide the maximum amount of information while assuring necessary confidentiality to lessors, lessees and payors where appropriate; and

(13) Overcome the detrimental financial effects to tribes of the U.S. Supreme Court decision in *Cotton Petroleum* v. *New Mexico* by providing a mechanism whereby multiple taxation does not deter natural resource companies from doing business on Indian lands.

While the legislative recommendations above are being considered by Congress, the Special Committee recommends that the following actions be taken by the Minerals Management Service as soon as practical:

(1) Revise the Explanation of Payment form to provide a clearer report to Indian allottees, using industry forms as prototypes. MMS, in conjunction

with allottee representatives, should be the lead agency in this process;

(2) Create a special team within the existing Royalty Compliance Division which will audit exclusively tribal and allottee leases;

(3) Use the MMS Auditing and Financial Accounting System to flag tribal and allottee leases for audit;

(4) Expand the membership of the Royalty Management Advisory Committee (RMAC) to include additional Indian allottee representatives;

(5) Send notice and information to all mineral-producing tribes concerning the availability of "202" and "non-funded" agreements;

(6) Implement accounting systems to monitor valuation problems and improper deductions;

(7) Enforce, by implementing penalties where appropriate, the performing of majority pricing and industry's compliance with lease provisions unique to Indian leases; and

(8) Take actions to expedite the MMS and Department of the Interior appeals process.

Based upon the Special Committee's recommendations, MMS has already approved in large part the internal actions described above.

In addition to the above legislative proposals, the Special Committee recommends passage of S. 1289, the "National Indian Forest and Woodland Enhancement Act," to provide proper protection of Indian timber and forest lands. S. 1289 will:

(1) Enumerate specific goals for developing, maintaining and enhancing Indian forest lands;

(2) Require the federal government and Indian tribes to set aside up to 10 percent of every timber sale on Indian lands, and use this money to develop, maintain and enhance tribal forests. The bill allows either the federal government or tribal governments to take on these responsibilities; and

(3) Provide educational assistance to promising Indian students who desire to be trained in a forestry-related curriculum, in return for which each student will be required to work with the BIA or a tribal government.

THE ARKANSAS RIVERBED

To finally resolve the problems pertaining to the Arkansas Riverbed, the Special Committee recommends that BLM survey the Riverbed as expeditiously as possible. In response to the Special Committee's investigation, Congress has already appropriated $550,000 for fiscal year 1990 to survey the Arkansas Riverbed and provide litigation support to the Arkansas Riverbed Authority. (*See* Public Law 101-121, signed by the President on October 23, 1989.)

LEGAL REPRESENTATION

To increase the responsiveness of the Secretary of the Interior ("Secretary") and the Solicitor of the Department of the Interior ("Solicitor") to Indian needs, and expedite the Solicitor's cases involving Indian matters, the Special Committee will propose legislation to make both the Secretary and the Solicitor subject to dual confirmation by the Senate Energy and Natural Resources Committee and the Select Committee on Indian Affairs.

The Special Committee further recommends that the Solicitor, in conjunction with BIA:

(1) Create guidelines to institute more timely methods of responding to tribal requests for litigation; and

(2) Implement training of BIA personnel so that the factual and technical bases for litigation reports are developed in an efficient and timely manner.

Moreover, to ensure proper legal representation of Indian interests, the Special Committee recommends the appointment of a Special Counsel for the Assistant Secretary for Indian Affairs to provide independent legal advice.

PROTECTING INDIAN GAMING FROM CRIMINAL INFLUENCE

To further protect Indian gaming from infiltration by organized crime, the Special Committee recommends amending Public Law 100-497, which established the Indian Gaming Commission, to provide the Commission with law enforcement authority and the ability to utilize information compiled by the Federal Bureau of Investigation.

THE INDIAN HEALTH SERVICE

Under the New Federalism for American Indians, tribes may ultimately choose to take full responsibility for the delivery of health care to tribal members. In the meantime, the Special Committee will propose legislation to:

(1) Make the Director of IHS subject to U.S. Senate confirmation;

(2) Place the Indian Health Service's Office of Program Integrity and Ethics (OPIE) under the direct supervision of the Office of the Assistant Secretary for Health;

(3) Require the Director of OPIE to report to the Director of IHS on a monthly basis and the Assistant Secretary for Health on a quarterly basis and submit such quarterly reports to Congress;

(4) Increase OPIE's funding to enable it to hire full-time, experienced investigators and auditors; and

(5) Fund a nationwide survey, to be overseen by the Select Committee on Indian Affairs, of American Indian physicians and health professionals to determine their attitudes about IHS, the causes of IHS' inability to recruit and retain Indian doctors, and possible measures to make service on the reservations more attractive.

The Special Committee also recommends that the Select Committee on Indian Affairs closely monitor the progress of the IHS Quality Management Initiative (QMI).

INDIAN HOUSING

Under the New Federalism for American Indians, tribes may ultimately choose to assume full responsibility for Indian housing projects. In the meantime, in addition to reforming the Indian preference contracting program (*see* the recommendations on Indian preference contracting *supra*), the Special Committee will propose legislation to:

(1) Require that HUD disapprove the construction of any Indian housing unless it obtains written assurances from proper parties that (i) all sites are available for the building and location of new housing units, (ii) all utilities, including electricity, gas,

water, phone and sewer service, will be available to the sites where the houses are to be built, and (iii) all necessary roads and easements will be available to access the construction sites;

(2) Provide HUD with statutory authority to issue sanctions against parties who provide written reasonable assurance of utilities, easements, or road access and who subsequently revoke such assurance, such as disallowing the party from providing services on other federal projects if alternative sources are available;

(3) Provide funds for the specific purpose of employing professional architects and engineers within the six regional HUD Offices of Indian Programs who would be responsible for reviewing all architectural and engineering plans submitted for Indian housing construction projects; and

(4) Require that inspectors employed by Indian Housing Authorities (IHA's) meet minimum training and educational standards, and be evaluated by HUD regional staff at least once annually.

In addition, the Special Committee recommends that HUD take the following internal actions:

(1) Revise internal guidelines (the HUD Indian Housing Handbook), with input from IHA's, to clarify the responsibilities of HUD and the IHA's for various aspects of project development; and

(2) Enforce compliance with these internal guidelines by IHA's, contractors and HUD employees, thereby encouraging consistent administration of Indian housing projects.

Based upon the initiative of the current Director of HUD's Office of Indian Housing, HUD is currently revising its internal guidelines.

APPENDIX A

ORGANIZATION AND CONDUCT OF THE SPECIAL COMMITTEE ON INVESTIGATIONS

Organization of the Special Committee

In October 1987, *The Arizona Republic* ran an extensive series of articles on the state of American Indians and the failures of federal and tribal agencies which are supposed to serve them. Prompted by these and other reports of fraud and corruption, Chairman Daniel K. Inouye and his colleagues on the United States Senate Select Committee on Indian Affairs decided to investigate fraud, corruption and mismanagement in American Indian affairs, no matter where or to whom it led. Chairman Inouye, who combined a longstanding commitment to Native American rights with extensive involvement in Senate investigations, moved quickly to establish a Special Committee on Investigations to uncover and root out these pernicious barriers to Indian self-determination.

The Special Committee on Investigations of the Select Committee on Indian Affairs, authorized by the Senate in February, 1988, had a unique mission in the annals of congressional and federal oversight of American Indian affairs. As set forth in Part Two of the Report, Congress itself has a long history of investigating the federal government's relationship to Indians. Yet never before in that history had a special committee been assembled whose sole task was to conduct a comprehensive and intensive investigation of the entire spectrum of the federal government's relationship with American Indians. Moreover, unlike prior investigative committees such as Iran-Contra or Watergate that were designed to investigate a specific set of already established allegations, the Special Committee was tasked simply to investigate fraud, corruption and mismanagement—the precise allegations were unknown *ab initio*.

To conduct the investigation, Chairman Inouye chose three members of the Select Committee on Indian Affairs. Appointed as Chairman and Co-Chairman of the Special Committee on Investigations were Senators Dennis DeConcini and John McCain, respectively. The Chairman and Co-Chairman both hailed from Arizona, which holds the second largest Indian population of any state in the nation, and serve as the ranking Democrat and Vice Chairman, respectively, of the Select Committee on Indian Affairs. The third member of the Special Committee was Senator Thomas Daschle of South Dakota, home to nine Indian reservations. From the outset, the Chairman and Co-Chairman of the Special Committee decided to conduct the investigation in a completely bipartisan manner, and together hired one non-partisan, unified staff, without majority or minority designations.

The rules adopted by the Special Committee gave it a wide range of investigative powers, permitting it to hold hearings, issue subpoenas *duces tecum*, receive sworn testimony and depose witnesses under oath. These powers were far-reaching and essential tools for an effective investigation.

Armed with its mandate, the Special Committee set about to hire an experienced investigative staff. With the need to search out and investigate as yet undefined allegations of fraud and corruption in Indian programs, the Committee required individuals with a broad range of investigative and legal expertise. To lead the investigation, Chairman DeConcini and Co-Chairman McCain appointed Kenneth Ballen, a former federal prosecutor and counsel to the House Iran-Contra Committee, as Chief Counsel and Staff Director. Assisting him as deputies were J. Sedwick Sollers, another former Assistant U.S. Attorney; Michael Anderson, an attorney experienced in Indian law from the firm of McKenna, Conner & Cuneo; and Mary Lou Soller, Deputy Director of the federal Public Defenders Service. Additional experienced attorneys complemented the Chief Counsel and his deputies, including particularly John Brandolino, formerly of the firm of Ginsburg, Feldman and Bress, and Andy Klingenstein, formerly of the firm of Hogan & Hartson. The Chief Investigator was Special Agent Richard James Elroy, with over eighteen years as an FBI agent, detailed to the Committee after being selected by the Director of the FBI as one of his most outstanding agents. Assisting in the investigation at times were the former IRS investigator responsible for the Spiro Agnew case, two experienced American Indian investigators, petroleum investigators and others. Sam Hirsch served as Deputy Staff Director, and played a critical role in writing the final report. Scott Celley acted as a press liaison. The Chief Accountant was Charles Norman, a partner in a leading accounting firm, with over 10 years of oil and gas experience. His deputy was Randy Fetterolf, who had extensive experience in mineral accounting, representing both major oil companies and state and local governments. The Special Committee also repeatedly solicited the services of well-known scholars and professionals with experience in Indian law and policy, many of whom served as consultants to the Committee, including Dr. Frederick Hoxie, Director of the D'Arcy McNickle Center for the History of the American Indian at the Newberry Library in Chicago. Lance I. Morgan and Percy Samuel provided additional assistance with the final report. The skilled support staff was led by Kathy Momot and Mary Ellen Fleck.

THE INVESTIGATION

After the staff was carefully hired and organized, the Special Committee formulated a comprehensive investigative plan. It had been the experience of both the members and the professional staff that an investigation cannot succeed unless its overall needs and goals are clearly analyzed in advance. As a result, a plan was devised and the investigation itself was divided into four phases.

In the first phase the Special Committee gathered the facts necessary to evaluate existing problems and identify potential targets for further intensive study. The second phase entailed interviewing and deposing fact witnesses throughout the country and subpoenaing and collecting all relevant documents and other evidence. Only after the investigative process thoroughly ran its course and pursued every promising lead were the facts sifted and coherently presented in the third phase of the investigation, namely two full series of public hearings. After the public hearings the Special Committee entered its fourth and final phase, the preparation and issuance of a final report and legislative recommendations.

INITIAL FACT-GATHERING

In March 1988, the Special Committee began its first phase of the investigation by seeking to gain a thorough foundation in the workings of the Department of the Interior as it affects individual Indians and tribes. Documents were sought from the Department, and briefings were given by Departmental personnel, including the Assistant Secretary for Indian Affairs, the Solicitor, the Inspector General and other high officials from the Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), and Minerals Management Service (MMS), as well as individual meetings with Secretary Hodel. The Committee requested and received 334,620 documents from the Department of the Interior on a wide variety of topics concerning American Indians.

Because federal programs in almost every executive department besides the Department of the Interior affect Indians, from the Departments of Defense, Justice and Health and Human Services, Veterans and Commerce, to Housing and Urban Development, Agriculture, the Office of Management and Budget and the Small Business Administration, the Special Committee sought relevant documents and briefings from these departments and agencies as well. In all, a complete series of briefings by high officials in these departments were held and over 128,700 documents were requested and analyzed by the Special Committee staff.

Another important component in the Special Committee's work was to obtain the full participation of Indian tribal governments and leaders. The Special Committee repeatedly spoke to tribal groups and wrote letters to officials of every federally-recognized tribe and Alaskan native group in the country, informing them of our investigation, soliciting their input and guidance and requesting their assistance. The first letter was in May, 1988. Letters were next sent in December of 1988 to alert tribal governments to the Committee's upcoming hearings. Between the first and second round of hearings, letters were mailed to all tribal governments requesting their input, summarizing the hearings to date and previewing the next set of public hearings. The most recent letter, sent at the end of June, 1989, again sought the assistance and suggestions of all Indian tribal governments and also notified them of the conclusion of the public hearings and the beginning of the drafting of the report and recommendations. In all, the Special Committee sent over 2,000 letters to those who serve as recognized tribal government leaders and received essential guidance in return.

Not content with this formal outreach alone, Special Committee attorneys and investigators visited reservations and tribal offices of more than 70 recognized Indian tribes and Native Alaskans, in sixteen states, including Alaska, Arizona, California, Colorado, Idaho, New Mexico, New York, North Carolina, North Dakota, Montana, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming. Special Committee attorneys and investigators met tribal chairmen and other tribal officials, attended tribal council sessions and tribal hearings, as well as speaking to many tribal members individually. All these meetings, interviews and contacts were used to gather information about issues of concern to individual Indians and tribes, as well as to locate potential witnesses and evidence.

INVESTIGATIVE PHASE

The second phase of work found Committee investigators identifying potential witnesses, collecting and subpoenaing documents and other relevant evidence, and continuing to develop a full range of contacts. Confidential, off-the-record information relayed to the Special Committee was critical to this process.

Interviews

The Special Committee staff conducted more than 2,010 interviews, with present and former officials and employees from the government (including, BIA, HUD, MMS, BLM, IHS, etc.); Indian tribal officials and leaders; federal contractors; housing, construction, oil, gas, hard mineral, timber and other corporate personnel; Indian allottees; oil gaugers and experts; bankers; attorneys; engineers; architects; law enforcement officials (FBI, Inspectors General, U.S. Attorneys); state officials; health officials, teachers, social service workers and other interested Indian and non-Indian leaders and citizens. During the course of conducting these interviews, the staff of the Special Committee traveled tens of thousands of miles and visited 27 states.

Subpoenas and Document Requests

In addition to interviews, the Special Committee has also sought to obtain all relevant documents and other evidence. As a result, the Special Committee secured more than 1,140,000 documents in total. As outlined above, approximately 463,320 documents have been received from numerous government agencies, including the Departments of the Interior, Health and Human Services, Housing and Urban Development, Education, Commerce, Justice, and Agriculture, and the General Accounting Office, among others. Tribes, tribal groups, and individual Indians have provided still other documents. All of these documents have been provided pursuant to request by the Special Committee.

Moreover, the Special Committee also obtained relevant evidence by legal compulsion. The Special Committee has subpoenaed documents and other evidence from 307 individuals and corporations. Those subpoenaed included natural resource companies, banks, surety companies, hotels, airlines, brokers, and other private businesses. These subpoenas generated the production of more than 677,000 documents. In addition, the Special Committee has subpoenaed numerous individuals and company personnel to provide testimony as well as issuing interrogatories under oath, in connection with the documents produced.

Depositions, Immunity and Surveillance

Sworn testimony was also sought from members of the private sector, government employees and others. In all, more than sixty-five depositions were taken by the Special Committee, many conducted in the field. Witnesses were deposed in Arizona, Colorado, Kansas, Missouri, Montana, New Mexico, North Carolina, Oklahoma, South Dakota, and Utah, among others, as well as in Washington, D.C.

During the course of depositions, some witnesses asserted their Fifth Amendment privilege against self-incrimination. The Committee, therefore, had to decide whether to seek the compulsion of testimony over Fifth Amendment objections by obtaining a court order immunizing a witness against the use of compelled testimony in criminal prosecutions. This limited immunity is commonly known as "use immunity." Although it does not bar criminal prosecution of the compelled witness, use immunity imposes on the prosecutor the burden of demonstrating that the government's evidence is not based on or derived from information obtained during the immunized testimony. The Committee was mindful of this burden on the Department of Justice and only granted use immunity if the Department of Justice fully consented. Other factors also influenced the Committee's decisions on immunity, including the Committee's need for evidence from a particular witness, the extent to which the witness' testimony was likely to be probative and whether any alternative sources of the same evidence existed. In all, the Special Committee sought the compulsion of testimony through use immunity for 26 witnesses—the same number as the Senate and House Iran-Contra Committees.

Unlike most investigative committees before it, the Special Committee also sent its investigators into the field to engage in active surveillance. Two examples of this relate to the Committee's investigation into Peter MacDonald, Chairman of the Navajo Nation, and oil theft from Indian land.

At one point it was brought to the attention of the Special Committee that Chairman MacDonald might be planning a cover-up to obstruct the Special Committee's investigation. In consultation with his lawyer, the businessman who was to participate in this cover-up agreed to be wired and placed under surveillance by Special Committee investigators while speaking to Chairman MacDonald. On at least ten different occasions between November 1988 and January 1989, in cooperation with duly authorized law enforcement officials, the Committee taped conversations with the businessman, Byron T. "Bud" Brown, Chairman MacDonald and his son Peter MacDonald, Jr. in cars, restaurants, airports and over the phone. Portions of these taped conversations were later played during the Committee's public hearings.

In the natural resources investigation, Committee investigators actively engaged in surveillance of oil leases and back-gauging to check company practices of measuring oil. Putting eight Indian leases under surveillance, the Special Committee teams remeasured oil to check for possible theft.

THE PUBLIC HEARINGS

The Special Committee held public hearings during the winter and spring of 1989. The hearings received daily coverage in the news media, including regular reports by *The Washington Post, The New York Times, The Arizona Republic* and Associated Press, as well as extensive gavel-to-gavel televised coverage by the Congressional Satellite Public Affairs Network (C-SPAN). The hearings opened on January 30 with a panel of distinguished tribal chairpersons: Chief Phillip Martin of the Mississippi Band of Choctaw Indians; Chief Wilma Mankiller of the Cherokee Nation; Chairperson Twila Martin-Kekahbah of the Turtle Mountain Band of Chippewa Indians and Chairman Joe Flett of the Spokane Tribe. The opening afternoon session presented the Committee with crucial testimony from noteworthy former federal officials, including Reid P. Chambers, Louis F. Claiborne, Leonard Garment, Bradley H. Patterson, Jr., and Robert Robertson.

The next two days dealt extensively with abuse of Indian preference laws by fraudulent contractors. The witnesses from January 31 through February 2 included Indian and non-Indian contractors and officials from the BIA and Small Business Administration. For most witnesses, extensive documentation demonstrating fraudulent relationships was also entered into the public record.

With an introduction from private contractors, the hearings on corruption among elected officials of tribal governments commenced in full on February 6, including as witnesses the son of the Chairman of the Navajo Nation, Peter MacDonald, Jr. The principal witness the next day, Bud Brown, told the Committee of his business dealings with Chairman MacDonald and the development of the perjurious cover-story fabricated by the Chairman. Excerpts of surreptitious tapes were played and blow-ups of profit agreements and checks, as well as other documents, were used to substantiate the testimony. To close the day, the Committee heard from Dr. Annie Wauneka, a respected leader of the Navajo Nation.

There followed more testimony on tribal corruption and gambling and three days of hearings on the tragedy of child sexual abuse in BIA-run schools. On child abuse, testimony came from 38 witnesses, including parents, teachers, psychiatrists, law enforcement officials, BIA education officials, social service workers, and child law experts. The videotaped confession of a convicted child molester was also presented.

On Thursday, February 23, a prestigious panel of witnesses was called consisting of the Honorable Archibald Cox, the Honorable Harold Tyler and the Honorable Erwin Griswold. They provided extremely useful testimony allowing the Committee to gain a critical understanding of relevant legal and other issues facing American Indians.

The last day of hearings for the first round was February 27th. This day brought before the Special Committee federal officials to respond to the allegations that had been made against their agencies during the first month of hearings. These officials included the Acting Assistant Secretary for Indian Affairs of the Department of the Interior, the Director of the Office of Indian Housing at HUD and the Director of the Division of Clinical and Preventive Services at the Indian Health Service. This final day was concluded as the first round began: with a panel of distinguished tribal chairmen—Chairman Ivan Sidney of the Hopi Tribe, Chairman John Washakie of the Shoshone Tribe and Chief John Taylor of the Eastern Band of Cherokee Indians—leaders brought forth to give the Committee their views on what the Committee had investigated and what the Committee still needed to examine.

By the end of the first round of hearings, the Special Committee had heard from ninety-four witnesses, totaling approximately sixty hours of testimony. These witnesses were called from sixteen different states and ten different tribes. They included former White House assistants, present government employees, professionals, scholars, tribal leaders, and parents of sexually abused children, among others.

The topics for the second round of hearings largely focused on the management of natural resources of Native Americans by the United States government, including oil and gas theft by industry, the federal royalty accounting system, the particular problems of Indian allottees, and federal water and timber management. In addition, witnesses were called to testify on both Indian health and housing.

The second round of hearings started on Tuesday, May 9 with testimony concerning oil theft from Indian lands. For the next two days, the Special Committee received testimony from oil and gas experts, investigators, oil gaugers, theft enforcement specialists, and BLM officials on oil theft and the government's failure to detect and prevent theft.

On Thursday, May 11, the Committee heard from three impressive panels from the Ute Tribe of the Uintah and Ouray Indian Reservation, Southern Ute Tribe and Shoshone and Arapaho Tribes of the Wind River Reservation who testified on the development and management of their own natural resources.

The problems of allottees were then addressed with testimony from allottee witnesses and experts on allottee royalty matters. They were followed by high-ranking Interior officials, including the Director of MMS.

After four days of oil and gas hearings, the Special Committee turned its attention to the Indian Health Service, followed by tribal leaders and experts on the detrimental practices of the Bureau of Reclamation at the Wind River Reservation in Wyoming and the problem of contaminated drinking water for the Sac and Fox Nation. Hopi officials, including Chairman Ivan Sidney, also testified to water problems at their reservation.

On May 18th, the Special Committee heard from tribal chairpersons of the Cherokee, Choctaw, and Chickasaw Nations along with natural resource specialists and legal experts on the Arkansas Riverbed lands.

At the end of these two weeks of hearings of the second round, the Special Committee reconvened again to call the new Secretary of the Interior, Manuel Lujan, Jr. A high ranking FBI official, Oliver B. Revell, also provided important testimony, as well as two distinguished tribal law enforcement officials. The Special Committee concluded its hearings on the afternoon of June 8 with a further examination of Indian housing and a panel of notable experts and tribal representatives on timber management.

The Special Committee conducted a total of 20 days of hearings, spanning four months, and covering more than seventeen topics. The second set of hearings brought the Committee witness tally to 172. In addition to the direct tribal testimony of the first round, the Special Committee heard testimony from seventeen additional tribes. By the time the hearings were completed, the Special Committee had questioned over fifty government witnesses on the policies and practices of nineteen different government agencies. Fourteen tribal chairpersons testified before the Committee. The Government Printing Office published complete transcripts of the Special Committee's public hearings, including supporting documentation, as S. Hrg. 101-126, Parts 1-11.

THE FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS

The fourth and final phase of the Special Committee's efforts was the drafting of a Final Report that summarized the principal findings of its investigation, drew conclusions from those findings, and set out legislative recommendations. In addition to a far-reaching and visionary proposal for a "New Federalism for American Indians," the Report set out several dozen legislative recommendations concerning every major area of the Committee's investigation. The Final Report, unlike those of many congressional investigations before it, was bipartisan and was unanimously adopted by all members of the Special Committee. Finally, the U.S. Senate Special Committee on Investigations concluded its work with a budget surplus.

APPENDIX B

REPORTS OF CONGRESSIONAL INVESTIGATIONS OF AMERICAN INDIAN AFFAIRS, 1792 TO 1989

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